INDEPENDENT COUNSEL REAUTHORIZATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 811

INDEPENDENT COUNSEL REAUTHORIZATION ACT

MARCH 3, 1993

Serial No. 5

Printed for the use of the Committee on the Judiciary

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INDEPENDENT COUNSEL REAUTHORIZATION ACT

WEDNESDAY, MARCH 3, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2226, Rayburn House Office Building, Hon. John Bryant (chairman of the subcommittee) presiding.

Present: Representatives John Bryant, George W. Gekas, Barney Frank, Jim Ramstad, Bob Goodlatte, and Bob Inglis.

Also present: Paul J. Drolet, counsel; David A. Naimon, assistant counsel; Cynthia Blackston, chief clerk; and Raymond V. Smietanka, minority counsel.

OPENING STATEMENT OF CHAIRMAN BRYANT

Mr. BRYANT. The subcommittee will come to order. The Subcommittee on Administrative Law and Governmental Relations is this morning holding a hearing on H.R. 811, the Independent Counsel Reauthorization Act of 1993.

The law providing for the appointment of Independent Counsel was first enacted as part of the Ethics in Government Act of 1978. In both 1982 and 1987 the Congress passed bills which were signed by President Reagan extending the Independent Counsel Law for 5 years. President Clinton, unlike his predecessor, President Bush, supports efforts to extend the act and the act expired on December 15, 1992, just 2½ months ago.

The bill pending before the committee today would extend the Independent Counsel law for another 5 years. It restores the key provisions of the 1978 act which require the Attorney General to seek the appointment of Independent Counsel to investigate credible and specific allegations of serious wrongdoing by high executive branch officials and to prosecute them where appropriate. The bill also preserves the Attorney General's discretionary authority to seek Independent Counsel to investigate allegations of wrongdoing by others in cases that involve a personal, financial, or political conflict of interest for officials of the Justice Department.

While the law has generally worked well, the authors of the bill recognize the need to gain better control over spending by Independent Counsel. The bill would amend the law to require that Independent Counsel conduct all activities with due regard for expense, authorize only reasonable and lawful expenditures assigned to a specific employee the duty of certifying that expenditures are

reasonable and made in accordance with law and comply with established policies of the Department of Justice regarding expenditure of any funds except where such compliance would be inconsistent for the purpose of the statute.

The bill also amends the act to specifically require Independent Counsel to follow the Federal laws and regulations that apply to travel by employees of the executive branch and agencies and would enact, as well, a number of other restrictions. It also includes a provision proposed last year by the ranking minority member of this subcommittee, Representative Gekas, to require each Independent Counsel to give the Congress an annual progress report, including information adequate to justify the expenditures that such counsel has made.

And finally, the bill amends the act to provide a specific category of coverage for Members of Congress and frees the Attorney General from the burden of making a conflict of interest determination when deciding whether to apply for the appointment of Independent Counsel with regard to Members of Congress.

Even though the act provided authority for the use of Independent Counsel in investigating and prosecuting allegations against Members of Congress in cases involving conflicts of interest with the Department, no Attorney General has ever sought to exercise that authority. The bill clears up confusion about whether Members of Congress are covered by the law and makes it easier for the Attorney General to apply for an Independent Counsel in such cases.

[The bill, H.R. 811, follows:]

I

103D CONGRESS
1ST SESSION

H. R. 811

To reauthorize the independent counsel law for an additional 5 years, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 1993

Mr. BROOKS (for himself, Mr. BRYANT, and Mr. FRANK of Massachusetts) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To reauthorize the independent counsel law for an additional 5 years, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Independent Counsel Reauthorization Act of 1993".

SEC. 2. FIVE-YEAR REAUTHORIZATION.

Section 599 of title 28, United States Code, is amended by striking "1987" and inserting "1993".

SEC. 3. ADDED CONTROLS.

(a) COST CONTROLS AND ADMINISTRATIVE SUPPORT.—Section 594 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(l) COST CONTROLS AND ADMINISTRATIVE SUPPORT.—

"(1) COST CONTROLS.—

"(A) IN GENERAL.—An independent counsel shall—

"(i) conduct all activities with due regard for expense;

"(ii) authorize only reasonable and lawful expenditures; and

"(iii) promptly, upon taking office, assign to a specific employee the duty of certifying that expenditures of the independent counsel are reasonable and made in accordance with law.

"(B) DEPARTMENT OF JUSTICE POLICIES.—An independent counsel shall comply with the established policies of the Department of Justice respecting expenditures of funds, except to the extent that compliance would be inconsistent with the purposes of this chapter.

"(2) ADMINISTRATIVE SUPPORT.—The Director of the Administrative Office of the United States Courts shall provide administrative support and guidance to each independent counsel. No officer or employee of the Administrative Office of the United States Courts shall disclose information related to an independent counsel's expenditures, personnel, or administrative acts or arrangements without the authorization of the independent counsel.

"(3) OFFICE SPACE.—The Administrator of General Services, in consultation with the Director of the Administrative Office of the United States Courts, shall promptly provide appropriate office space for each independent counsel. Such office space shall be within a Federal building unless the Administrator of General Services determines that other arrangements would cost less.".

(b) INDEPENDENT COUNSEL PER DIEM EXPENSES.— Section 594(b) of title 28, United States Code, is amended—

(1) by striking "An independent counsel" and inserting

"(1) IN GENERAL.—An independent counsel"; and

(2) by adding at the end the following new paragraphs:

"(2) TRAVEL EXPENSES.—Except as provided in paragraph (3), an independent counsel and persons appointed under subsection (c) shall be entitled to the payment of travel expenses as provided by subchapter 1 of chapter 57 of title 5, including travel or transportation expenses in accordance with section 5703 of title 5.

"(3) TRAVEL TO PRIMARY OFFICE.—An independent counsel and any person appointed under subsection (c) shall not be entitled to the payment of travel and subsistence expenses under subchapter 1 of chapter 57 of title 5 with respect to duties performed in the city in which the primary office of that independent counsel or person is located after 1 year of service by that independent counsel or person (as the case may be) under this chapter unless the employee assigned duties under subsection (l)(1)(A)(iii) certifies that the payment is in the public interest to carry out the purposes of this chapter. Any such certification shall be effective for 6 months, but may be renewed for additional periods of 6-months each if, for each such renewal, the employee assigned duties under subsection (l)(1)(A)(iii)

makes a recertification with respect to the public interest described in the preceding sentence. In making any certification or recertification under this paragraph with respect to travel and subsistence expenses of an independent counsel or person appointed under subsection (c), such employee shall consider, among other relevant factors—

"(A) the cost to the Government of reimbursing such travel and subsistence expenses;

"(B) the period of time for which the independent counsel anticipates that the activities of the independent counsel or person, as the case may be, will continue;

"(C) the personal and financial burdens on the independent counsel or person, as the case may be, of relocating so that such travel and subsistence expenses would not be incurred; and

"(D) the burdens associated with appointing a new independent counsel, or appointing another person under subsection (c), to replace the individual involved who is unable or unwilling to so relocate.".

(c) INDEPENDENT COUNSEL EMPLOYEE PAY COMPARABILITY.—Section 594(c) of title 28, United States Code, is amended by striking the last sentence and insert-

ing the following: "Such employees shall be compensated at levels not to exceed those payable for comparable positions in the Office of United States Attorney for the District of Columbia under sections 548 and 550, but in no event shall any such employee be compensated at a rate greater than the rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5.".

(d) ETHICS ENFORCEMENT.—Section 594(j) of title 28, United States Code, is amended by adding at the end the following new paragraph:

"(5) ENFORCEMENT.—The Attorney General and the Director of the Office of Government Ethics have authority to enforce compliance with this subsection.".

(e) COMPLIANCE WITH POLICIES OF THE DEPARTMENT OF JUSTICE.—Section 594(f) is amended by striking "shall, except where not possible, comply" and inserting "shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply".

(f) PUBLICATION OF REPORTS.—Section 594(h) of title 28, United States Code, is amended—

(1) by adding at the end the following new paragraph:

"(3) PUBLICATION OF REPORTS.—At the request of an independent counsel, the Public Printer

shall cause to be printed any report previously released to the public under paragraph (2). The independent counsel shall certify the number of copies necessary for the public, and the Public Printer shall place the cost of the required number to the debit of such independent counsel. Additional copies shall be made available to the public through the Superintendent of Documents sales program under section 1702 of title 44 and the depository library program under section 1903 of such title."; and

(2) in the first sentence of paragraph (2), by striking "appropriate" the second place it appears and inserting "in the public interest, consistent with maximizing public disclosure, ensuring a full explanation of independent counsel activities and decision-making, and facilitating the release of information and materials which the independent counsel has determined should be disclosed".

(g) ANNUAL REPORTS TO CONGRESS.—Section 595(a)(2) of title 28, United States Code, is amended by striking "such statements" and all that follows through "appropriate" and inserting "annually a report on the activities of the independent counsel, including a description of the progress of any investigation or prosecution conducted by the independent counsel. Such report may omit

any matter that in the judgment of the independent counsel should be kept confidential, but shall provide information adequate to justify the expenditures that the office of the independent counsel has made".

(h) PERIODIC REAPPOINTMENT OF INDEPENDENT COUNSEL.—Section 596(b)(2) of title 28, United States Code, is amended by adding at the end the following new sentence: "If the Attorney General has not made a request under this paragraph, the division of the court shall determine on its own motion whether termination is appropriate under this paragraph not later than 3 years after the appointment of an independent counsel and at the end of each succeeding 3-year period.".

(i) AUDITS BY THE COMPTROLLER GENERAL.—Section 596(c) of title 28, United States Code, is amended to read as follows:

"(c) AUDITS.—By December 31 of each year, an independent counsel shall prepare a statement of expenditures for the fiscal year that ended on the immediately preceding September 30. An independent counsel whose office is terminated prior to the end of the fiscal year shall prepare a statement of expenditures by the date that is 90 days after the date on which the office is terminated. The Comptroller General shall audit each such statement and shall, not later than March 31 of the year following

the submission of any such statement, report the results of each audit to the Committee on the Judiciary and the Committee on Government Operations of the House of Representatives and to the Committee on Governmental Affairs and the Committee on the Judiciary of the Senate.".

SEC. 4. MEMBERS OF CONGRESS.

Section 591(c) of title 28, United States Code, is amended—

(1) by indenting paragraphs (1) and (2) two ems to the right and by redesignating such paragraphs as subparagraphs (A) and (B), respectively;

(2) by striking "The Attorney" and all that follows through "if—" and inserting the following:

"(1) IN GENERAL.—The Attorney General may conduct a preliminary investigation in accordance with section 592 if—"; and

(3) by adding at the end the following new paragraph:

"(2) MEMBERS OF CONGRESS.—When the Attorney General determines that it would be in the public interest, the Attorney General may conduct a preliminary investigation in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate wheth-

er a Member of Congress may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.".

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall become effective on the date of the enactment of this Act.

Mr. BRYANT. We welcome the witnesses today and I would first like to express my gratitude to all of you for being here. I will, at this time, recognize the gentleman from Pennsylvania, the ranking minority member for any opening statement he might have.

Mr. GEKAS. I thank the Chair and I'll take this opportunity to wish and us luck as we proceed down the road of this new term. We, you and I, have coworked on many issues in the past and I feel that the prospect of our production this term is very high. So I'm glad that you are wielding the gavel.

Mr. BRYANT. Thank you very much.

Mr. GEKAS. In that regard, your opening statement encompasses most of what I would want to put into the record with respect to what should be the content of the Independent Counsel reauthorization or authorization, really.

One fact, though, that was projected by the Chair has different colorations as I review the background of it, the Chair indicated that the President—the past President, George Bush, did not put his full weight behind an Independent Counsel statute. That may have been so, and actually might have been justified with some of the things that had been occurring during his term; but also, I have to make an addendum to why we didn't reauthorize the statute the last time, it was our impression that the Democrat leadership, particularly in the House, made a decision—a sober decision—not to pursue the reauthorization before the expiration of the old statute in late last year. But, be that as it may, having now made the record clear on where the blame lies for it the prospects for reauthorization or a new statute are very good.

I, myself, will be introducing the legislation to which reference has been made by the Chair in the opening statement with some of the salutary features which he has indicated would be contained. One additional fact, though, about the content of my legislation—which I will make every effort to incorporate into the final product—would be that investigations of Members of Congress would be a mandatory category just like the categories that are targeted within the language of the bill that we're going to be considering. One need look only to recent events concerning our colleague Congressman Ford to determine that if we're going to have an Independent Counsel statute at all, it should include Members of Congress as a mandatory category, otherwise, we will continue to have the kinds of activities that we have seen, with pressure being applied on the Attorney General to intervene in a court case in Tennessee. It is unfair to our fellow Congressman to have this kind of thing go on. The Independent Counsel statute which would include Members of Congress would have avoided all of that and we would not have this headline grabbing type of controversy with an angry judge in Tennessee venting his spleen on the executive and having all the wrong impressions—the perception of the public which we want to cure get worse instead of better, and so the argument goes that even though the language in the bill that is going to be presented as the main vehicle here has a discretionary feature allowing the Attorney General to focus on Members of Congress, which he always could anyway in certain cases, ours stretches far beyond that and enters the field of the good perception that the public can have when it sees that the final legislation is going to contain

Members of Congress as equal covictims, as it were, or cotargets of investigations of the Independent Counsel.

With that, I thank the Chair for scheduling the hearings this early and we will proceed to coordinate into a final bill that will do credit to the House.

Mr. BRYANT. Thank you. I thank the gentleman for his remarks and particularly for his nice comments at the beginning and look forward to working with him as well.

The gentleman from Massachusetts.

Mr. FRANK. Thank you, Mr. Chairman. I missed the gentleman's nice comments. I will read those in the record.

[Laughter.]

Mr. FRANK. But, I want to say with regard to this issue of coverage of Members, I am a little puzzled, because this bill does what people on the other side have said they wanted us to do which is treat Members of Congress exactly as everybody else is treated. There is a separate subclass set up here that is given special treatment and those are people who are intimately related politically, and governmentally, to the person who appointed the Attorney General; Members of Congress have from the beginning under this statute been treated exactly like everybody else. So people may want to argue that Members of Congress are to be given special treatment in this statute, but if they do, obviously we'll meet that one on the merits. But people should be very clear this is a statute, which from the beginning when it was passed, treats Members of Congress as every other American citizen is treated with a very small number of exceptions, those exceptions being people who have been appointed to high-level positions by the executive branch. It should be clear that there were four Republican Attorneys General under this statute, Mr. Smith, Mr. Meese, Mr. Thornburg, and Mr. Barr. All four of those Republican Attorneys General had at all times complete unfettered authority to appoint Independent Counsel for any investigation for a Member of Congress.

No one has ever suggested that there was the slightest hinderance. It was a wholly discretionary act. At any point an Attorney General could have triggered the Independent Counsel process, vis-a-vis, any Member of Congress and it could not even have been challenged. I cannot think of a forum in which it would have been successfully challenged and none of the four Republican Attorneys General who during that time investigated a number of Congressmen, prosecuted and indeed convicted some Congressmen of both parties. At no point did any of the four Republican Attorneys General, appointees of President Reagan and President Bush, ever think that there was a conflict. And I find there to be a glaring article in consistency between people who tell me there was automatically, and in every case a conflict, when an Attorney General prosecutes a Member of Congress and the four Republican Attorneys General who never found such unvarying conflict in any particular case.

Finally, I would want to say, this is not the primary forum for that, but I thought the actions of the Acting Attorney General with regard to the case of Harold Ford were quite courageous. I think that the Federal Government as the Justice Department is not just out to win, it's out to do justice. It seemed to me that there was

clear evidence of racial motivation on the part of the selection team and I think that was inappropriate and I think what the Attorney General did was a very courageous act in furtherance of justice. But the key issue here is how should you treat Members of Congress and I think we are, in fact, in this case being treated as every other American citizen is treated. Any time any Attorney General thinks there should be an Independent Counsel he can trigger it and people may remember that Edwin Meese, as he left office, promulgated a kind of an executive order of sorts which said hereafter any investigation involving Members of Congress would be by an Independent Counsel. He did not, himself, use the procedure, which he could have, but he left it to his successor, Mr. Thornburgh and Mr. Thornburgh pretty promptly undid that. Thornburgh disagreed with Meese and when Meese tried to suggest that Thornburgh would have to appoint Independent Counsel. Thornburgh, as did Barr and William French Smith and Edwin Meese, decided that there was never any time when such a conflict existed apparently, because they never used the procedure.

Thank you, Mr. Chairman.

Mr. BRYANT. Are there other opening statements? The gentleman from Minnesota.

Mr. RAMSTAD. Well, Mr. Chairman, in the interest of time I'm going to submit my statement for the record because we have such a distinguished group of panelists about to testify including one of the greatest former linemen ever to play football at the University of Minnesota, so I'm certainly looking forward to hearing from our panelists.

I applaud the chairman for taking this up as one of the first legislative pieces of business by the subcommittee this year. I regretted like, I think, many Members of the body that Congress let the Independent Counsel statute expire last December and we need to renew it. We're going to have plenty of time to debate the mandatory nature of the statute as it relates to Members of Congress and I just look forward to hearing from the witnesses.

Mr. BRYANT. Our first witness today is the Director of the Administrative Office of the U.S. Courts, L. Ralph Mecham. I welcome you and thank you for being here.

Mr. FRANK. If I might say, if the gentleman would yield, I hope that the younger gentleman from Minnesota intends to follow the blocking of the more senior gentleman from Minnesota during the course of this legislature.

Mr. BRYANT. Welcome, Mr. Mecham.

STATEMENT OF L. RALPH MECHAM, DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Mr. MECHAM. Mr. Chairman and members of the committee, it's an honor to be here. I would just like the record to show that although I may look like the greatest football player that played for Minnesota, I really believe he was referring to Judge MacKinnon.

Mr. RAMSTAD. For the record, that is correct.

Mr. MECHAM. It's a privilege for me as a bit player in this enterprise to have the chance to be, I guess, your first witness for the first hearing of this newly constituted subcommittee. I'll try not to let you down in my bit role and I'm sure that Judge George

MacKinnon who will follow me will not because he's not been a bit player, he's been a real star in this enterprise and he and I have been neighbors since 1969, when we bought neighboring houses. I've worked very closely with him and we have tried to do everything we could to carry out the will of Congress to make this act work. He's been a great tower of strength.

Mr. Chairman, may I offer my statement for the record and then perhaps paraphrase a couple of things.

Mr. BRYANT. It would be great for you to do it just that way.

Mr. MECHAM. My name is Ralph Mecham and I'm Director of the Administrative Office of the U.S. Courts. I also wear a second hat as secretary of the Judicial Conference of the United States and I'm here basically to present the position of the Judicial Conference and the Administrative Office. By way of background, the Judicial Conference consists of 27 members, the presiding officer is a Chief Justice, who, by the way, wrote the opinion in the *Morrison* case which was approved by the Court with only one dissenting vote, and the other members are the 13 circuit Chief Judges and the elected district judges, one from each circuit. So I might say, Mr. Chairman, that Judge Barefoot Sanders, for 3 years, served on the Judicial Conference and only recently completed his term and it was a pleasure to work with him.

We take no position on the basic bill; that is, neither the Judicial Conference nor the AO. Our sole concern deals with section 3(a)(2) and (3) of the bill which in their key part provide that "the Director of the Administrative Office of the U.S. Courts shall provide administrative support and guidance to each Independent Counsel." Basically our feeling is that, even though we've been in this business now since the early 1980's, and as we've seen what's happened when the Administrative Office, a judicial branch agency, has been placed in the middle of the firing line between and among various members of the two political branches and the Independent Counsel firing back and forth, it doesn't give us any comfort to be technically neutral noncombatants when we're dodging bullets from all directions.

Instead, it seriously compromises our role to serve the judicial branch for us to continue to be placed in a prosecutorial support function where we're asked to provide administrative and administerial support to the Independent Counsel. Nevertheless, I would like to think we have done a reasonably good job in doing it. The General Accounting Office had some criticisms and we have taken them seriously. We have taken steps to correct the deficiencies that we agreed with. We have disagreed with a few criticisms where we thought they were wrong, but the basic underlying problem is that we really have not had standards against which to do our work. There is nothing in the statute, there is nothing in the legislative record proscribing standards or enforcement authorities and mechanisms. The Justice Department which has the legal responsibility to provide this support, felt it was a pretty hot potato and negotiated with an underling of my predecessor for the AO to do this job, and we did it. The Judicial Conference was not aware of the agreement at the time; but experience, I think, has shown that we have done our best in the areas where we can improve, as the General Accounting Office said, we have been anxious to do so.

As I point out in my statement we have really been in a catch-22. First, we have absolutely no authority under the law to police or regulate the Independent Counsels, nor would we want it. I think the idea is they are supposed to be independent. We were told, I understand, when we took this responsibility on that we were not supposed to be regulating or policing the Independent Counsel. We were a pass-through, a conduit, ministerial source of support. We were not there to interfere with the independence of the counsel. But yet the General Accounting Office has now raised the standard on us. They have said the little support field goal that we kicked, when we managed to get one between the uprights wasn't very graceful and it may have kind of gone off the sidebar, but it did clear the upright. They have now set a standard 150 feet high and 6 feet wide and said we have failed to meet that even though the statute doesn't provide such a standard, the General Accounting Office doesn't provide it, the Justice Department didn't provide it, yet we're now criticized for not doing all that they retrospectively, we feel, should have done to police the Independent Counsels. I don't think that was our role. But I just wanted to make that point to you because truly we have been caught in a catch-22, and we couldn't win. We have been in a lose/lose situation. We thought we were out there trying to help the public in a good government role.

So there is an inherent conflict then between our being asked as a judicial branch agency to be involved on a daily basis with regulating or even being a conduit for records, materials handling, payroll, contracts, and such involving the Independent Counsel which is a prosecutorial entity. And at the very least, I think the Judicial Conference fears that it also rubs up against the traditional notions of separation of powers between the two branches. For that reason, the Judicial Conference has adopted the following resolution:

Resolved: that the mission of the Administrative Office of the U.S. Courts and its component units is incompatible with responsibilities for, or activities in support of prosecutorial functions of government such as those of Independent Counsel, and that any such prosecutorial entity that currently exists, or that is created by the Congress, should not rely on the Administrative Office or any of its component parts for administrative functions, policy guidance, review or any other ongoing or intermittent support.

It's not a partisan issue, it may be somewhat of a philosophical issue, but the Conference is made up almost equally of those appointed by Republican and Democratic Presidents. The Executive Committee which adopted this resolution is made up of seven judges including four circuit chiefs and three district court judges. One of those circuit chiefs was appointed by President Nixon; the three others were appointed by President Carter. One of those circuit chiefs' wives served as a Cabinet member for Governor Clinton when he was Governor. All of the three district court judges were appointed by President Nixon.

My point is, this is an institutional matter. This is not some sort of a partisan matter at all. The judiciary doesn't think we belong in the business. I'm afraid some of the staff in the Senate and the House felt that we were somewhat obstructionist because we tried to carry out the orders of our bosses. That has not been our goal.

I think our record of trying to support the Independent Counsels, as a group trying to work with Judge MacKinnon, trying to work with each of the counsels, individually is, arguably, at least halfway good and we would like to suggest you come up with some other possibilities.

For locations, for the function of providing administrative support, if you decide to pass the law, one, the General Accounting Office, apparently is a big expert. Maybe they ought to do it, or the Independent Counsels—excuse me, the General Accounting Office or the General Services Administration, which has a function that performs this sort of activity, and if you really don't want it, and neither do the other branches, we hope it wouldn't be in the judiciary, at least our particular office—maybe a small, independent office would be the answer out of the political arena.

Mr. Chairman, that's my brief summary of my statement. I thank you for the privilege.

Mr. BRYANT. Thank you, Mr. Mecham.

[The prepared statement of Mr. Mecham follows:]

TESTIMONY OF L. RALPH MECHAM, DIRECTOR,
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
March 3, 1993

Thank you for inviting me to testify on H.R. 811, the Independent Counsel Reauthorization Act of 1993. I am Ralph Mecham, Director of the Administrative Office of the United States Courts, in which position I also serve as Secretary of the Judicial Conference of the United States. The Conference is the body within the Judicial Branch of the Federal government that sets policy for the governance of the Judiciary, excluding anything related to determination of individual cases, which is left to the judges themselves. I am here to present the views of the Judicial Conference of the United States and of the Administrative Office on a portion of the legislation.

The Judicial Conference consists of 27 members with the Chief Justice of the United States as its presiding officer. The other members are the 13 chief circuit judges who cover the entire country, 12 district judges from each of the geographical circuits, and the Chief Judge of the Court of International Trade.

Neither I nor the Conference take any position on the basic thrust of H.R. 811. It is not our role to evaluate the need or lack of need to reauthorize the Office of Independent Counsel and we make no comment on that basic issue. Our sole interest and

concern with the legislation is limited to Section 3(a)(2) and (3) of the bill, which in its key part provides "The Director of the Administrative Office of the United States Courts shall provide administrative support and guidance to each Independent Counsel." In essence, this bill would task an entity within the Judicial Branch of government to support an entity -- the Independent Counsel -- that has a prosecutorial function. The Judicial Conference has concluded, and I concur, that this is an inappropriate function for the Administrative Office to perform, and we respectfully request that you delete us from the bill.

The Administrative Office is the support entity for the Judicial Branch (except for the Supreme Court) that basically provides support services needed by the Branch, including support of 25 committees of the Judicial Conference as well as the Conference itself. As a part of the Judicial Branch of government, the Administrative Office historically, with only one exception that I am aware of, has performed support functions for and within the Judicial Branch.

As I am sure the Committee is aware, the Administrative Office, on a voluntary basis, has provided administrative support to Independent Counsels for several years. This was carried out under an agreement between subordinates of my predecessor and the Justice Department. I am sure this agreement was entered into in an effort to accommodate the Justice Department and provide a

temporary service. However, in practice, it has not worked well at all, especially in recent years.

The Administrative Office is caught in a "Catch 22" position. First, we have no authority whatsoever to enforce compliance with Federal laws and Executive Branch regulations as they apply to Independent Counsels on such matters as payment for hotel accommodations, per diem, first-class travel, contract laws, personnel regulations, accounting procedures, and an array of other regulatory requirements. Yet, the General Accounting Office recently issued a report on the Independent Counsel program which criticized the Administrative Office for not enforcing the laws and regulations, even though we have no lawful power to enforce them.

We have taken a series of steps to correct the administrative deficiencies cited in the GAO report. But the fundamental problem is that the Independent Counsels are not answerable to the Administrative Office and cannot be compelled to follow any guidance we might give them. Yet, we are expected to issue checks and to keep the balances and the Independent Counsels are completely free to ignore any questions that we might raise.

We are concerned that the proposal to involve a Judicial Branch entity, the Administrative Office, in a typically Executive Branch function, prosecutions, at the very least rubs up against traditional notions of separation of powers between the branches. It is not my role to rule on the constitutionality of the proposal, but it is my duty to bring to this Committee's attention what appears to be a substantial augmentation to the traditional role of the Administrative Office. This issue has been raised with the Judicial Conference, whose Executive Committee -- which acts on behalf of the Conference between sessions -- strongly opposed this proposed role for the Administrative Office. The resolution, unanimously adopted by the Executive Committee, reads:

> **RESOLVED:** that the mission of the Administrative Office of the United States Courts and its component units is incompatible with responsibilities for, or activities in support of prosecutorial functions of government such as those of Independent Counsels, and that any such prosecutorial entity that currently exists, or that is created by the Congress, should not rely on the Administrative Office or any of its component parts for administrative functions, policy guidance, review or any other ongoing or intermittent support.

In addition to the possible constitutional issues raised by Section 3(a)(2) and (3), there are several serious administrative difficulties with the Administrative Office's providing support to the Independent Counsels. First, statutes, regulations, policies and procedures of the Executive Branch differ in significant ways from those of the Judicial Branch. Our staff are not experts on Executive Branch regulations and it is costly to require them to be trained to apply two sets of laws and regulations. Second, the Administrative Office has no means of enforcing compliance with the applicable regulations. It cannot supervise, regulate, or compel compliance with law and regulations by the Independent Counsels. Finally, even if the legislation is revised to place more responsibility and accountability with the Office of the Independent Counsel itself, there is no way, short of establishing an ongoing, independent support unit, to build in the needed internal controls within each Office of Independent Counsel.

We recognize that the Office of Independent Counsel is a constitutional anomaly, ill-suited to report in the usual fashion to any of the three branches of government. Because of this, you may wish to consider creating a small independent agency or office to service the Independent Counsels. Alternatively, the legislation could provide for the rendering of administrative support services through GAO, or through GSA's External Services Program.

In summary, the Judicial Conference and the Administrative Office remain opposed to this one aspect of the proposed legislation. Aside from the problem of intermingling prosecutorial and judicial support functions, our concern is that the Administrative Office's primary mission to serve the Judiciary is compromised by being placed between competing or conflicting entities of the two political branches of government. The Administrative Office's role to serve the Judicial Branch should not be diminished or diverted.

Thank you again for the opportunity to express my views and the views of the Judicial Conference of the United States.

Mr. BRYANT. The Chair recognizes itself for 5 minutes.

Your office has been administering this or performing this administrative function since the first day, if I am not mistaken, since 1978, when this statute was first enacted, isn't that right?

Mr. MECHAM. Probably the second day. I think the early 1980's is when we first got involved with it.

Going over the records, I don't think we were involved in it until about 1982 or 1983.

Mr. BRYANT. Well, it's not possible to listen to your remarks without observing that, as far as we can tell, you all have been perfectly happy to perform this function until the GAO issued some criticism of you recently.

I am not aware of any complaint, prior to that time, ever having been sent up to the Hill about your role in this.

Mr. MECHAM. Yes, sir. I think that's a fair statement but I would add to it also the fact that there has been a great deal of political fire-play going on here. We have been caught in the middle of that and we didn't relish that especially and felt that that was compromising my role to serve the judiciary.

Our job is to serve the judges, not the prosecutors or the executive branch, and so, yes, I would say the General Accounting Office report was one of the factors. The other is just a sense that we don't belong in that political arena.

Mr. BRYANT. Well, I'm not too sure I understand why you—I don't want the judiciary in the political arena or even an agency of the judiciary, which you are, but it's not occurred to me until your comments this morning that it is a political arena.

In effect you guys are managing funds for people that have been assigned to a job by the special prosecutor statute.

Mr. MECHAM. We have been requested by various groups of Congress and media to divulge all sorts of information on records and materials of the Independent Counsel which we try to maintain confidential.

We have been condemned when we have not revealed it and in one instance, when by mistake some was revealed, we were attacked for doing that and then we were sort of held up as not doing our job by the General Accounting Office, so yes, I don't like the heat I guess.

We don't have quite the ability you Members of Congress have to deal with this sort of thing.

Mr. BRYANT. I was going to say that being condemned and attacked and held up as not doing a good job is a pretty common experience for us. It's hard for us to develop too much sympathy.

Mr. FRANK. And they don't have to run.

Mr. MECHAM. Just for cover, Mr. Frank.

Mr. BRYANT. The provision that you referred to in subsection 2 specifically states what the rules are with regard to disclosure. You'll not have any ambiguity about that if Chairman Brooks's bill passes, wouldn't you agree?

Mr. MECHAM. Yes, I think it does. Whether or not we are in a position to keep that statutory directive may be another thing because we don't have FBI clearance. We can't guarantee security. We have got GS–4 or –5 clerks and we don't clear our people with

the idea that they are supposed to keep sealed records or not divulge the material.

That goes all the way up through the organization. I think it would impose a very substantial added cost and burden on us. Obviously if you tell us that is what we must do, we'll do it, but we are not particularly eager to do that.

The second problem is the rules and regulations differ between the judicial branch and the executive branch. Our people are experts on the judiciary and some of the things that the General Accounting Office faulted us for were interpreting and reviewing actions for Independent Counsels the same way that they are for judiciary employees. This wasn't accurate apparently for the executive branch employees. So I've got to have my staff become experts now on the executive branch statutes, regulations, rules, and policies solely because of this very limited responsibility. Again it is a burden we would not aspire to.

Mr. BRYANT. Well, now insofar as I know, you all have done a fine job with the court system. I regret these hearings only allow us to focus on things that are complaints, but you referred to what the GAO criticized you for. Specifically they found that the Office had initially charged more than $2.4 million in payroll expenditures to the wrong Independent Counsel, which appears to me just to be a matter of administrative error as opposed to anything fundamentally wrong with assigning this to you.

Mr. MECHAM. I tried to acknowledge in my statement that we do not claim a purity and virtue on all matters and some of those criticisms are legitimate.

I must say that, yes, it did happen that the changes were not applied to the correct Independent Counsel Office. However, the total account was the same. We swiftly corrected that.

We provided a detailed response to Mr. Bowsher on November 24 on that issue and all the other weaknesses the GAO found in their audit. Where we wished to disagree with them, we disagreed in our response.

Since then we have provided a similar detailed report of February 19 to Mr. Alan Mandell, Assistant Director of the General Accounting Office, indicating the progress we are making on each of these criticisms, and I would be happy to submit them for your files or for your record or whatever you would wish to have us do.

Mr. BRYANT. I didn't intend to inquire into the details of the criticisms in order to focus on them but to point out that it appeared to me that what the criticisms were was simply related to accounting mistakes but don't relate to any problem with the fundamental notion of having your agency carry out this job.

Mr. MECHAM. Well, perhaps not, but there is criticism, for example, in the procurement area.

We have felt free to advise Independent Counsels on procurement matters and they have chosen at times to ignore us. We don't have any authority to force them to follow our advice but the General Accounting Office says we should have somehow stopped them from doing what we advised against, so nowadays I am just sending letters to the General Accounting Office to say, "OK, here's a problem—you tell us what we are supposed to do with it" because there are no standards in the law. There are no standards any-

where other than those used by the Justice Department which my staff are not trained in.

The General Accounting Office has vetted standards after the fact and has asked us to apply them. Now they found some weaknesses in our organization and we are trying to correct those, but they have endeavored to impose standards retroactively on us that no one ever told us existed before and I think that's sort of an unfair thing to do.

Mr. BRYANT. Well, I think it is a fair defense on your part. I am certainly willing to offer you the forum to make that defense.

The question for us is though once we set standards as this statute attempts to do, are you or are you not still the proper agency for carrying out this task?

Mr. MECHAM. I would say not, for the reasons I said.

Mr. BRYANT. My time has expired. I recognize the gentleman from Pennsylvania for 5 minutes.

Mr. GEKAS. I thank the Chair and following up on some of the assertions of that GAO report, are you saying, sir, that on competitive bidding that normally follows procurement procedures that you had no authorization or any guidelines to compel the Independent Counsel to submit that for bids and that kind of thing, or that you yourself would be submitting it to bids?

Mr. MECHAM. We were not in a position to compel them to do anything either on contracts or hiring or hotels or per diem or anything else.

We did feel we had a responsibility to be of assistance and to try to help them do their own work, and I must say we were told from the start that the whole idea of Independent Counsel means that we were not supposed to compel them to do anything, so we did not have authority to exercise, nor did we attempt to.

Sometimes our recommendations were not followed. Most times they were. Sometimes they were followed a bit late, but the problem we had with the General Accounting Office is that they gave us some sort of a random blast for not applying recently determined standards both in the past and currently. We felt that was a bit unfair to us. I also note the fact that the General Accounting Office by statute was required to audit the Independent Counsel starting in 1987 twice a year and never did it. So had they even audited them one time in 1987, they would have been able then to give us some of the guidance they now retroactively want to impose on us in 1992.

I just find a fundamental element of unfairness in that process. It would have been very helpful to have them in the battle from the beginning instead of trying to kill the wounded after the battle is over when they had a statutory responsibility to do those audits and they didn't do them.

We would have loved to have had some guidance from them because the statute was silent, Justice was silent, and it would have been nice to have the GAO, which is a good organization, give us some guidance.

Mr. GEKAS. Can I ask, any request that Independent Counsel made of whatever proportion or how much money was involved would just be routinely honored by you because you felt you had no authority to question it?

Mr. MECHAM. Not routinely honored. If there was a question, we would raise it, and most of the times——

Mr. GEKAS. What kind of questions would you raise, on what kind of issues?

Mr. MECHAM. Well, certainly sole-source contracting would be an example or per diem or first-class air travel. In those cases however, in the last case our General Counsel felt that this was appropriate. Although we raised the question, he felt that first-class travel under certain instances was appropriate, but those are the kinds of things—vouchers, expense accounts, hiring practices.

Mr. GEKAS. And there was no monetary, no cap on the amount that they could request or the amount that you could authorize?

Mr. MECHAM. Well, as I read the statute, it was a permanent, indefinite appropriation. I am trying to remember. If there were limits, they were largely imposed by Congress and I am not aware of any financial limits, and we were expected, of course, to follow Federal executive branch guidelines and standard and we did try to do that even though we are not experts in it.

For the most part, I think it worked pretty well. I think most of the counsels did pretty well, but there were episodes here and there, which the General Accounting Office correctly pointed out, where they did not follow those guidelines and the GAO got after us because the Independent Counsels did not follow the guidelines and said somehow we were supposed to, I guess, police them and compel them to do it, although we didn't have the authority to do that.

Mr. GEKAS. On another incidental portion of your work, when the three-judge panel undertakes to select and appoint Independent Counsel, is there any involvement from your office in the extra expenses there——

Mr. MECHAM. No.

Mr. GEKAS [continuing]. Or just for that function or if they're already serving?

Mr. MECHAM. Only after that point do our expenses—we are not involved in that process at all.

That is the division or counsel as you called it. That is their responsibility to make the appointment pursuant to law, but at that point the Justice Department will notify us. They have the legal responsibility to provide the support we have provided—please let me emphasize this again—our support to Independent Counsels is based on a voluntary agreement.

We are not compelled to do this. We did it back in 1984 and the chairman correctly pointed out that when we have been burned the last 2 years, we kind of lost our ardor for the project.

Mr. GEKAS. I have no further questions.

Mr. BRYANT. The gentleman from Massachusetts.

Mr. FRANK. I sympathize with your characterization. I think the GAO pointed the wrong finger to some extent at you and I think your point about retroactive standards is a fair one.

It is clear that's what happens when you legislate. Not everything occurs to you all at once and we make mistakes. We made a mistake by underprescribing standards in this case and I think part of the problem was and while I admire overall the work that

Judge Walsh did, I do think that they erred in, they made a mistake that people make sometimes.

For all the criticisms of our perks, people in the private sector at certain levels live much better than people in the public sector and it appears to be Judge Walsh's problem was they forgot they were moving into the public sector. They seemed to be living at a standard that was more appropriate to the private sector and if you are using your own money, that is more appropriate, so I think they did make some mistakes there and you should not have been blamed for them.

We can correct that. As the chairman of the subcommittee has pointed out, the bill that the chairman has introduced, that he and I cosponsored, we provide those standards.

As you have read the bill, do you think the standards are too imprecise? Do you need more specificity in those standards?

Mr. MECHAM. Well, basically, as I read the statute just on the administrative aspect of it——

Mr. FRANK. The new one.

Mr. MECHAM. As I recall, it says provide—what is it—guidance, and I'd have to dig out the statute here.

Mr. FRANK. Well, let me put it this way. If you think that that needs to be given more——

Mr. MECHAM. Support and guidance.

Mr. FRANK. If you think it needs to be given more specificity as to your authority to tell them that they are doing something they shouldn't be doing or they can save money, I would be glad to listen to that.

Mr. MECHAM. Well, first of all, we would hope you would ask someone else to do the job.

Mr. FRANK. I understand that.

Mr. MECHAM. And I understand what you are asking me. I have no problem with the support part about it.

Mr. FRANK. OK.

Mr. MECHAM. I think, you know, there's sort of a history on that, but the guidance element eludes me.

We still have no authority and I am not sure we should have authority or otherwise the Independent Counsels may not be truly independent, but that's a pretty imprecise standard for somebody who has got to decide whether a particular voucher ought to be approved or a sole-source contract should not be let.

Mr. FRANK. I understand, and what we are looking for is to improve it. I have to say, and this has occurred to me a lot these days, I accept much of what you say about why you are not the ideal administering agency but I think we have to be guided here by the wisdom of a philosopher who was a contemporary of Judge MacKinnon, and there are of course few people who can say that—Henny Youngman, who is of course also a relative of the counsel of the committee who sits behind me.

The question, of course, was how is your spouse? And the answer is—compared to what?

When we evaluate your ability to perform this function and your suitability, the question compared to what comes to mind, and I regret to tell you that you are at this point considerably in the lead, as I do that calculation. If you have another contender, I would be

glad to listen to it but that's the problem, so therefore my advice to you would be while you have every right to maintain your objection to taking on the function, given the possibility that you might get it anyway, if there are ways in which you can suggest we can improve it, that will not prejudice your right to object to it, and I think we'd be very clear about that.

You have an absolute right to say you don't think you should do this and no one should criticize you for voicing that opinion and I don't think your offering suggestions about how to do it should be used against you in that sense. There's no inconsistency, but I think that's where we are because we do need some entity to do the administering, especially since I think we were guilty, we, the Congress, in not providing enough rules and guidelines and I think we do—the bill that the chairman has, some of these were suggestions of the ranking minority member. I think the bill that we are talking about now plugs some of those gaps and so someone is going to have to administer them.

Mr. MECHAM. May I comment, Mr. Chairman?

Mr. FRANK. Sure.

Mr. MECHAM. First of all, it's really gratifying to be viewed as slightly better by this body, or at least by you, than the General Accounting Office views us. That's a very plus and worth coming here today just for that.

The other thing, with respect to other possibilities, one might be to set up a small, independent office to support Independent Counsels. There's certainly ample authority for that and ample precedent for that in the Federal Government. I can think of a whole slew of them—Office of Special Counsel, and 8 or 10 others. It could be a group that could expand or contract as needed. Perhaps the staff could be hired on some sort of when-actually-employed basis, depending on the workload of the Independent Counsel, how many there are, et cetera. When you have got five or six major ones, that's a bigger workload. That would be one possibility.

Another possibility would be for the General Accounting Office itself, to do the job as an arm of Congress. I take it that there is a definite aversion to having it in the executive branch. I know that arrangements had been made for GSA to handle administrative support for Mr. DiGenova to assist him in his new responsibility, but I gather from members of the committee and the Senate as well, he didn't like it in the executive branch so we agreed to take it on anyway.

We're doing that but that would be another possibility.

Another one might be the division of the three judges in the D.C. circuit that appoints the Independent Counsels. Maybe you could have the D.C. Circuit Clerk's Office take it on. I don't think that's as good as the others but——

Mr. FRANK. Part of what you were talking about were kind of separation of powers considerations.

Mr. MECHAM. That's why I said it may not be as good.

Mr. FRANK. That would apply equally to the D.C. circuit as to you.

Mr. MECHAM. Right, in great part.

There is of course the Supreme Court decision that upholds at least the judges' participation in this in the *Morrison* case.

Mr. FRANK. Yes, and if the judges' participation is constitutional, yours is—all right, thank you, Mr. Chairman.

Mr. BRYANT. The Chair recognizes the gentleman from Minnesota.

Mr. RAMSTAD. I don't have any questions of this witness, Mr. Chairman.

Mr. BRYANT. The gentleman from South Carolina.

Mr. GOODLATTE. Virginia, you mean.

Mr. BRYANT. Virginia, excuse me.

Mr. GOODLATTE. I have no question, Mr. Chairman.

Mr. BRYANT. Mr. Mecham, thank you very much for being here today.

Mr. MECHAM. Thank you.

Mr. BRYANT. We appreciate it and we will take your recommendations under advisement.

Mr. MECHAM. Thank you.

Mr. BRYANT. At this time the Chair would invite to the witness table our next panel of witnesses, Prof. Samuel Dash, on behalf of the American Bar Association; and attorneys Richard Hibey, Terrence O'Donnell, and Tom Wilson.

I'm grateful to all of you for being here today.

Let me remind all the witnesses that, without objection, your written statements will be made part of the record of this hearing and let me also remind you that we are anxious to hear your views about the Independent Counsel statutes, about ways in which it might be modified to make it better, or if you are completely opposed to it, that opinion as well, but we are not here to relitigate any of the cases involving any of the Independent Counsel of the past or the present and would urge the members to make references to those cases only insofar as is necessary to make a point about whether we ought to reauthorize this statute.

Mr. RAMSTAD. Mr. Chairman, may I just interject? Are we deviating from the agenda that——

Mr. BRYANT. I think you have the older agenda.

Mr. RAMSTAD. We have a different agenda.

Mr. BRYANT. This is an updated agenda. The same witnesses are here. In fact, I think there may be a couple that dropped off but let me see this agenda.

Mr. RAMSTAD. Thank you.

Mr. BRYANT. Professor Dash, if you'll proceed. We're glad to have you here.

STATEMENT OF SAMUEL DASH, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. DASH. Thank you, Mr. Chairman. It's an honor to be here again before this committee, as I have in the past, and particularly to represent the American Bar Association, who from the very beginning of the Independent Counsel legislation has strongly supported this legislation as essential to maintain the integrity of Federal law enforcement.

I believe that it's so important that this committee should be commended that it has taken up both by introducing the bill and

by holding these hearings so early in this session of the new Congress.

It is particularly appropriate that you should be having this hearing and that this legislation should be enacted in the year 1993.

The year 1993 constitutes the 20th anniversary of the Senate Watergate hearings, which really did become the beginning of pointing the finger to the need for having independent prosecutors where you have a direct conflict of interest for the Attorney General or the Department of Justice where charges of Federal crime are aimed at high executive branch officials, such as the President of the United States, the Vice President, and Cabinet officials.

It also marks the 20th anniversary of the Saturday Night Massacre, where President Nixon forced the firing of Special Prosecutor Cox because he was doing his job too well, and I want to briefly allude to whether or not that kind of a special prosecutor can work today although it did work very well during Watergate.

I have been accused sometimes of having some paternal relationship to this legislation, and I'm certainly willing to accept that because I think this is a child that I'm proud of.

This legislation has been important for the period since 1978, it has worked well, and it deserves to be reenacted. In the past two periods of reauthorization, the Department of Justice and officials of the administration, including the Attorney General, have consistently objected to this legislation, complaining that it insults and demeans the integrity of the Department of Justice and demonstrates distrust in their ability to do their job.

I believe that they misunderstand the function of this legislation. There is no effort in this legislation to demean anybody's character or to in any way deny that a competent Attorney General and officials of the Department of Justice can effectively enforce the Federal criminal law.

This statute really is limited to very rare cases. I think we all agree—the Congress agrees and certainly the Senate Watergate Committee in making this recommendation agreed—that Federal law enforcement ought to be the exclusive responsibility of the Department of Justice and the Attorney General.

It's only on those rare occasions, as Congressman Frank pointed out, where the persons who are charged with Federal criminal offenses are really people who are colleagues and in the administration of the Attorney General where the conflict of interest is great.

Now, that doesn't mean, by the way, that an honorable Attorney General wouldn't have either the integrity or the guts to prosecute a Cabinet official or investigate the President of the United States. There are cases where I think we'd all agree that didn't happen, and where many Attorneys General in that situation would not. But we have a government of law, a rule of law, not of man, and even in situations where we've had outstanding Attorneys General, and I speak of Attorney General Levy during the Ford administration, the former president of the University of Chicago. I think no one doubted his integrity or his courage. But nevertheless, we don't pass laws in this country with regard to individual members of the Government or the Attorney General; we pass laws so that our rule of law and our constitutional government works.

I think we saw, particularly in the Saturday Night Massacre where it was so important that Federal law enforcement work and that the people of America have confidence in the enforcement of the Federal law, that you do not put that responsibility in the hands of a government official who does have that conflict, not only because you may fear that he may not carry out that responsibility, but because the public won't have confidence in it, because in our system of justice, what we want is that justice not only be fair and objective, but that it be perceived to be fair and objective.

I think that we have had occasion in this country, particularly during the life of this Independent Counsel legislation, where some very controversial issues have arisen regarding the Attorney General himself. We had two Independent Counsel who were appointed to investigate former Attorney General Meese. In both cases, those Independent Counsel came to the conclusion that there should be no prosecution initiated. Remarkably, neither in the media nor in any public discussion was that decision in any way challenged.

Imagine if the Department of Justice of the United States, which Attorney General Meese headed, had investigated and came to the same conclusion, and perhaps a correct conclusion, imagine the cries of coverup and whitewash that would occur. And that is what really sunders the confidence and the belief in the integrity of our justice system.

So I would believe that and I really think that any Attorney General should welcome this legislation because it really takes them off the hook, it removes the tremendous political pressures against him.

An honorable Attorney General, knowing that a decision not to prosecute will hold him suspect in the public's eye, unfortunately may lean over backward and act unfairly in cases in bringing prosecution, where an Independent Counsel would be able to do so without any kind of criticism whatsoever.

When we looked at the Independent Counsel legislation and who have held this job and what has happened over the past years since 1978, in most cases Independent Counsel who have been given the charge to investigate Federal wrongdoing by high executive officials have taken a fairly short time to look into it and have reported that there wasn't a basis for prosecution.

This has not been an act which has appointed people who saw their charge to go after people, to get people as has been the complaint; most Independent Counsel have actually objectively and fairly found that there was no basis for prosecution and have done it by winning the confidence of the American people.

We have had much of the complaint now where you have an Independent Counsel who has gone forward, and I think that much of that complaint has been unfounded.

This hearing is also substantially different from the one held before this committee in September 1992. Then the Attorney General's representative appeared and opposed reauthorization of the Independent Counsel provision. Today, at this hearing, the Clinton administration has not sent a representative to oppose the legislation. It's appropriate for the Clinton administration to await the confirmation of their Attorney General.

Now, I can't speak for the Clinton administration, but I certainly can report that President Clinton strongly supports this legislation. I know it as a member of a Special Committee on Watergate Reform.

Every 4 years, those of us who have had some responsibility in the Watergate investigations and in the Iran-Contra investigations form a committee and we pose questions to the Presidential candidates. One of those questions is what they think of or whether they support the Independent Counsel legislation. Candidate Clinton reported to us that he very strongly supports this legislation, and therefore, I think, in that capacity, I can report his support.

Another significant difference in this bill for reenactment is that it is introduced by a committee that has majority Democratic membership, although I understand that the Republicans on the committee are also supporting the bill. However, this is a Democratic administration. There often has been a complaint that the only time this legislation has really been introduced by Congress is by a Democratic Congress to impose it on a Republican administration. Here we don't have that. We didn't have that, by the way, in 1978, and President Carter sent a message to the Congress that he strongly supported the legislation.

All of the reasons, all of the reasons why this legislation was considered essential to the rule of law and constitutional government in 1978 remain just as strong and persuasive today. As I said, the Attorney General and the Department of Justice are in a clear conflict of interest where charges are made against high executive branch officials.

Also, this legislation, because of the nature of that conflict, is not aimed personally at the Attorney General of the Department of Justice; it's aimed at at least effecting the appearance of justice, the appearance of objectivity, and to get the confidence of the public.

There has been a recommendation that we don't need this legislation. Why don't we rely on what happened during Watergate? Why don't we just let the Attorney General appoint a special prosecutor? It worked well then. Why shouldn't it work now?

I would suggest to the committee, in fact direct the committee that that was a unique situation, particularly the kind of person who was Attorney General at the time, who was Elliot Richardson. He, during his confirmation, committed himself to appoint a special counsel.

In addition, the uniqueness of the Watergate hearings that sensitized the American public brought a tremendous response by the public, a unique response—unprecedented—when Cox was fired. I don't think we can look today to that as a model of what would happen if you had a special counsel appointed by the Attorney General, whether he would be perceived to be independent.

I do want to support all of the provisions of the bill as amended. I think that the reauthorization failed last time primarily because of certain perceived abuses. I personally don't think that those abuses were real. They came in generally two areas. One was unlimited spending, unaccountability as to spending, and one was unaccountability as to even tenure in office. Generally, unaccountability.

But I think if you look at the facts, that what the Independent Counsel in the Iran-Contra investigation was doing was not different than what the Department of Justice would have done or the Attorney General. They too, where they have targeted major and complex investigations and prosecutions, have spent as much money, if not more, in their investigations and have taken the same time. I think when you are dealing with complex investigations like the Iran-Contra investigation, it will do that. But the important thing is this is a perceived abuse, and I think it's a well widely perceived abuse, and therefore it calls for the kinds of amendments, both fiscal controls and tenure controls, that this bill, H.R. 811, imposes.

I want to address just one of them and conclude, and I think that you may want to reconsider it. That is that you are making the compensation of the employees of the Independent Counsel comparable to the employees in the U.S. attorney's office.

Ordinarily, that would be logical. The point is the difference between the U.S. attorney's office and the Independent Counsel is the U.S. attorney's office is an ongoing office. An employee or a lawyer who gets a job there is having a long-time job, and it's career building; whereas the Independent Counsel has to come out running. He's got to appoint his staff very quickly; he has to get experienced trial lawyers without the luxury of being able to train them. Most of these lawyers will have been graduates of the U.S. attorney's office and in jobs with higher pay.

If you require the Independent Counsel to pick his young lawyers and investigators from the same group that the U.S. attorney has to do, you'll get inexperienced people, you'll get people who won't have the kind of judgment and trial background that is needed, and it may cost you more in the long run.

It seems to me that experienced trial lawyers with the kind of judgment they have could make much speedier judgments on whether prosecution should begin or not; whereas inexperienced lawyers may take a much longer time and increase the budget and the spending.

I want to conclude, Mr. Chairman, by again commending the committee for bringing this legislation so early in the session before us.

As I've done in prior testimony, I want to recall for all of us the extraordinary public service of the late Senator Sam J. Ervin in the Watergate investigation and hearings. If he were here now, and I so wish he were, he would be telling you far more eloquently than I can ever do how urgent this legislation is for our country and why it must be enacted now.

Thank you.

Mr. BRYANT. Thank you, Professor Dash.

[The prepared statement of Mr. Dash follows:]

Prepared Statement of Samuel Dash, Professor, Georgetown University Law Center, on Behalf of the American Bar Association

Mr. Chairman and Members of the Subcommittee:

My name is Samuel Dash and I am a professor of law at Georgetown University Law Center, Washington, D.C. In my appearance here today I am representing the American Bar Association and its President, J. Michael McWilliams, to respond to your kind invitation to present testimony and to convey the American Bar Association's views in favor of the reenactment of the independent counsel provisions of the Ethics in Government Act.

By way of personal background, from February, 1973 to September 1974, I served as Chief Counsel and Staff Director of the U. S. Senate Select Committee on Presidential Campaign Activities, popularly known as the Senate Watergate Committee. The independent counsel legislation derives from the very first recommendation of the Final Report of the Senate Watergate Committee. I have also served as Chairman of the Criminal Justice Section of the ABA and as a member of the ABA's Standing Committee on Ethics and Professional Responsibility. I also served in the Criminal Division of the U.S. Department of Justice and as District Attorney of Philadelphia, Pennsylvania.

Since the original enactment of the independent counsel provisions in 1978, the ABA has maintained its involvement with the subject. For the last fifteen years, special committees and representatives of the ABA have issued detailed reports on this subject, proposed and lobbied for specific legislation, testified before Congressional committees, monitored developments under the resulting legislation, and filed briefs in lower federal courts as well as the Supreme Court in support of the independent counsel law.

Based on this extensive involvement with the subject, the ABA is convinced that it is imperative for the administration of justice and the continued public confidence in the fairness of our system of justice that Congress reenact the independent counsel provisions of the Ethics in Government Act. Our studies also convince us that, despite recent attacks from certain quarters on independent counsel and their investigations, the basic mechanism of the independent counsel law is soundly conceived and has functioned effectively since its passage in 1978 and its reenactment in 1982 and 1987.

Before addressing the few modifications we recommend, I believe it would be helpful to describe the development of the ABA's position and our perception of the implementation of the independent counsel provisions over the life of the legislation.

A. Original ABA Proposal

Since its founding in the nineteenth century, the ABA, the leading spokesperson for the organized bar in the United States, has been committed to promoting the fair and evenhanded administration of justice throughout the nation. (ABA Constitution § 1.2). The Association believes, as stated in its Standards Relating to the Prosecution Function, that to preserve the public's confidence in the administration of criminal justice, a prosecutor "should avoid the appearance or reality of a conflict of interest with respect to official duties."

Thus, in 1973, in the wake of Watergate, the ABA undertook to "explore ways to make the law enforcement agencies professionally independent legal arms of the government by insulating them from partisan influences." A seven-member committee studied the subject exhaustively for over two years and in 1976 produced a detailed analysis of issues entitled Preventing Improper Influence on Federal Law Enforcement Agencies.[1] Contained within the report were 20 recommendations, all of which were adopted as official Association policy. A central recommendation was that Congress should enact legislation authorizing the appointment of a temporary special prosecutor by a special court under carefully defined circumstances and standards. The report and resolution made clear that the mechanism would only be invoked in extraordinary circumstances.

The ABA recognized that the principal prosecutorial function of the federal government must always rest in the Department of Justice. As the report stated, "[p]rimary responsibility for assuring the impartial administration of

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1 American Bar Association Report, Preventing Improper Influence on Federal Law Enforcement Agencies (1976), reprinted in part in Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Committee on Government Operations, Part 2, 94th Cong., 1st Sess. 259-378 (1976).

justice shall reside in the attorney general." But in extraordinary cases, where the conduct of high ranking Executive Branch officials appointed by and serving at the pleasure of the President is involved, a separate mechanism is needed. The Supreme Court, in Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935), stated that,

> One who holds his office during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

As Professor Archibald Cox testified before this Committee in 1975:

> The pressures, the divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.

Our Association suggested that a triggering mechanism be created which would permit the appointment of a special prosecutor in circumstances when conflicts of interest, implications of partiality or the appearance of professional impropriety would make it inappropriate for a lawyer within the Department of Justice to handle the matter.

Congress adopted just such an approach in its enactment of the special prosecutor (later independent counsel) provisions of the Ethics in Government Act of 1978, and the experience under the Act has amply demonstrated the wisdom of this approach.

B. Implementation of the Independent Counsel Provisions

Contrary to the complaints of critics that the independent counsel provisions will invariably lead to prosecutorial abuse, the overall picture of this law has been one of restraint. In the 14 years of this statute, we are only aware of the appointment of 11 independent counsel. This record shows that the statute has served the purpose for which it was created in providing a means of handling exceptional cases in a manner free of conflict but not causing this extraordinary mechanism to be utilized excessively or routinely.

The results of these investigations also demonstrate the virtues of the statute. In the majority of cases, the independent counsel has decided not to prosecute. However, because the counsel has been independent of the agency or individual investigated, the public has been willing to accept these declination decisions regarding high level public officials as credible and free of any political taint. As one newspaper editorial noted, the independent counsel law "is an effective mechanism not only when an official is indicted and tried but also when he is cleared of wrongdoing, since absolution from a completely independent investigator is far more persuasive to the public than a clean bill of health bestowed by a cabinet colleague."[2]

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2 New Charges Against Mr. Pierce, Washington Post, July 26, 1990, at A26.

In fact, it can be argued that this process has been most useful over the years to the targets against whom informal complaints or charges have been lodged. For example, when Attorney General-designate Edwin Meese faced charges at his confirmation hearings that he had profited from his office as counselor to the President, Mr. Meese himself asked that an independent counsel be appointed in his case "because there must be a comprehensive inquiry that will examine the facts and make public the truth."[3] When independent counsel Jacob Stein declined to bring any charges against Mr. Meese, public confidence in the integrity of the appointment process was restored and Mr. Meese was confirmed. It is difficult to imagine that public doubts would have been similarly allayed by an inquiry conducted by staff members at the Department of Justice investigating their possible future superior.

Similarly, in the Iran-contra affair it was Attorney General Meese and President Reagan who called for the appointment of an independent counsel under the conflict of interest provision of the statute. It is important to remember that because the individuals initially implicated were not covered officials, the independent counsel statute was not

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3 Truth in Prosecution, Washington Post, June 18, 1987, at A22.

automatically triggered in the Iran-contra affair. Rather, this was a voluntary decision by the Attorney General. In calling for the appointment of the independent counsel, Attorney General Meese recognized that public confidence in the integrity of government is bolstered by the presence of independent counsel, as he announced: "Seeking an independent counsel in this case is consistent with the President's desire to insure public confidence that all facts in this case be ascertained and acted upon appropriately."[4]

Had President Reagan, facing the worst crisis of his presidency, left the investigation to the Justice Department, public confidence in the fair administration of justice might have been severely shaken. Attorney General Meese, who was the nation's top law officer, was a longtime political advisor and ally to the President. A decision not to prosecute could have been seen as a whitewash, while a decision to prosecute only lower level government personnel could have been seen as an attempt to create a scapegoat. The call for an independent counsel allowed the Reagan administration to avoid the appearance of any kind of coverup. The judicial appointment of an independent counsel restored credibility to the criminal investigation of the Iran-contra affair, and helped restore credibility to the United States government.

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4 Attorney General Edwin Meese, News Conference (Dec. 2, 1986), in New York Times, Dec. 3, 1986, at A11.

In those cases where an independent counsel has decided to prosecute, the statute has also proved its value. Four investigations have led to indictments; of those four, two have led to multiple prosecutions. For the most part, the results have been either guilty pleas or jury verdicts of guilty. In a few celebrated cases, particularly in Iran-contra, some convictions have been reversed on legal issues on appeal. In no case have there been suggestions that independent counsel lacked sufficient evidence to substantiate their charges or that they failed to prosecute the cases in court in a fair and professional manner. In short, the prosecutions, like the declinations, have maintained the public's confidence in the fair and impartial administration of criminal justice.

The statute has also withstood constitutional challenge. In Morrison v. Olson,[5] the Supreme Court upheld the validity of the statute in a 7-1 decision. As we argued in our amicus brief, "far from undermining the checks and balances of the constitutional system, the independent counsel provisions . . . serve as a needed counterweight to the unfettered ability of the President and the Attorney General to investigate and resolve serious criminal allegations against their closest political appointees."[6] Now -- when the constitutionality of the statute has been overwhelmingly affirmed by the Supreme Court and when

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5 487 U.S. 654 (1987).

6 Brief of American Bar Association as Amicus Curiae in Support of Appellant at 27, Morrison v. Olson, 487 U.S. 654 (1987)(No. 87-12

polls tell us that public confidence in government is waning -- is not the time to radically alter, or to fail to reenact the statute, which has been so well received by the public over the last fifteen years.

C. Time and Cost Factors

One criticism that has been leveled at the independent counsel statute involves the seemingly excessive length and cost of certain investigations. It is both inaccurate and unfair to use one or two investigations as a paradigm for all investigations under the independent counsel statute. The length and expense of any criminal investigation are direct functions of the complexity of the case or series of cases. It is impossible to generalize as to an optimum length of time or a cost ceiling for criminal investigations, be they federal or state, because such investigations are by nature fact-specific. Some cases can be handled expeditiously; others cannot. These principles apply whether the criminal investigations are conducted by an independent counsel or by the Department of Justice.

Concerns about the length and expense of criminal investigations are not limited to those prosecutions brought by

an independent counsel. As one former assistant U.S. Attorney writes:

> Similar complaints have been levied against nearly every major prosecution conducted by the Justice Department in the areas of political corruption, organized crime, and drug trafficking. The costs of any major prosecution, including the use of investigative resources, countless investigative manhours, document production, and the like is staggering.[7]

In the Iran-contra investigation, the office of independent counsel has had to contend with scores of witnesses scattered across the United States and the world, national security concerns, classification issues with voluminous documents, parallel Congressional hearings posing difficult immunity problems and many other issues which tend to delay final resolution.

Were such a series of cases involving many potential targets thoroughly pursued by the Justice Department, that investigation, too, would have significant costs and be quite time-consuming for investigation and litigation. Expenditures by an independent counsel come under more intense scrutiny, however, because, unlike the budgets of other law enforcement agencies, all costs of staff and personnel are itemized for that one investigation. If similar costs were itemized for major

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7 Patrick Deady, A Needed "Insurance Policy": Defending Special Prosecutors, Legal Times, Feb. 22, 1988, at 16.

Justice Department investigations of political corruption or organized crime, noted one former assistant U.S. Attorney, "the independent counsel might benefit from the comparison."[8] We agree with that assessment.

Both the Iran-contra and HUD cases involved widely publicized allegations of misconduct or corruption at high levels of the former Reagan Administration. Leaving such investigations to the Executive Branch would have undermined public confidence in their neutrality and thoroughness. Instead, as a result of the independent counsel, the public has been confident that the investigations have tried to find the truth, not cover it up. We believe that these investigations represent collectively an appropriate use of time and resources commensurate with the very substantial role these independent investigations have played in bolstering public confidence in the administration of justice and in our system of governance "by laws, not men."

In any event, it is important to focus on the overall impact of the independent counsel provisions and the conduct of all the independent counsel as a whole, rather than concentrate on any one investigation in particular. It is the wisdom and

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8 Id.

functions of the mechanism that should be judged, not the specific strategic decisions of one or two independent counsel. In our view, the mechanism has proven to be highly successful.

Nevertheless, we have no serious objections to most of the added cost controls provided in Section 3 of H.R. 811. They meet expressed concerns, will promote better fiscal accountability, and should be welcomed by independent counsel appointed in the future.

However, Section 3 (c), limiting the pay of employees of the independent counsel to levels not to exceed those payable for comparable positions in the Office of United States Attorney for the District of Columbia, can create problems that will handicap the independent counsel. The essential difference between positions in the United States Attorney's office and in the Independent Counsel's office is that in the former these positions are longer lasting and career building, and, therefore, lawyers -- usually at the beginning of their careers -- are willing to be paid at these levels.

On the other hand, the Independent Counsel's office is a temporary office - limited, realistically under H.R. 811, to three years. The independent counsel has to staff up immediately on appointment and must find well qualified and experienced trial lawyers who do not have to be trained. Such qualified lawyers usually can be found in the litigation sections of law firms, earning incomes substantially higher than

can be earned in the United States Attorney's office. Often these lawyers have graduated from the United States Attorney's office to better paid positions and cannot be expected to be willing to go backwards.

In addition, permitting the independent counsel to hire such experienced trial lawyers should result in reducing costs rather than increasing them. These lawyers, because of their skills and professional judgment, can be expected to make speedier discretionary decisions on whether prosecutions should be initiated or not. On the contrary, less-skilled lawyers who might be available at lower levels of compensation, may cause the investigation to be prolonged.

D. Proposed Changes in the Statute

We continue to believe, however, that two changes are needed in the statute, both relating to the role of the appointing court in the process. First, there should be judicial review of the Attorney General's decisions not to seek the appointment of a special prosecutor. Second, the statute should be clarified to give the appointing court specific authority to expand or modify the prosecutorial jurisdiction of the independent counsel once he or she is appointed. I will address each proposal in turn.

First, absent the option of judicial review in cases where the Attorney General decides against the appointment of an independent counsel, there is no way to assure the public that

the Attorney General's decision itself was not subject to political or personal pressures. During the preliminary investigation phase, the Attorney General has a large amount of discretion to assess the credibility of the evidence and to terminate an investigation. Although this discretion is warranted in order to prevent the unfair treatment of individuals and to protect against needless and costly investigations, we believe that there should be some offsetting review by the court to ensure that the Attorney General is meeting the standards set by Congress.

The court should have the authority to review whether the Attorney General has complied with the standards of the statute and whether there has been an abuse of discretion in declining to seek an independent counsel. In most cases, the court would base its review on the report submitted by the Attorney General at the conclusion of the preliminary investigation. The court would also have the authority to supplement its consideration of the report by using, for example, information from Congress to complete its review of the Attorney General's decision. In our view, the standards of the statute are sufficiently clear, and the court is perfectly capable of determining whether there has been compliance with them. Following its review, the court should be authorized to take "whatever action it deem(s) necessary," including the appointment of an independent

counsel in cases where the Attorney General has declined to do so. The court would not have the authority to decide whether or not there should be a prosecution.

The ABA proposal for judicial review does not contemplate private lawsuits or review of the Attorney General's decision not to undertake a preliminary investigation.

Second, the ABA believes that the statute should be clarified to give the appointing court specific authority to expand or modify the prosecutorial jurisdiction of the independent counsel once he or she is appointed. At present, there is an ambiguity in the statutory language. Under the statute, it is clear that the court has the initial responsibility to "define (the) independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 593(b). It is also clear that the court may expand the jurisdiction "upon request of the Attorney General . . . ." 28 U.S.C. § 593(c). However, the statute does not specifically state whether the court can expand the jurisdiction in a case where the Attorney General opposes expansion.

We believe that the intent of the existing statute is for the court to possess this authority. It would completely undermine the purpose and effectiveness of the statute to appoint an independent counsel while simultaneously allowing those whose potential conflicts of interest made such an appointment necessary to control and limit the investigation.

We ask that Congress specifically delineate the court's authority along these lines.

E. Conclusion

The events from the Watergate scandal through the Iran-contra and HUD affairs demonstrate the continuing need for a mechanism to assure the public that allegations of criminal misconduct by high-level Executive Branch officials will be investigated by neutral, independent counsel, who are free from partisan political ties or pressures.

Our government's legitimacy is based largely on its accountability to the American people. In general, the different branches of the federal government are able to hold each other in check. However, when there are allegations of misconduct within the branch which has the responsibility for prosecuting such activities, this accountability has the potential to break down, and, in doing so, threatens the very integrity and legitimacy of the United States government.

The independent counsel law plays a critical role in maintaining this integrity and accountability.

We urge the Congress to reenact this vital law.

Mr. BRYANT. If you all see me waggling this gavel, it will indicate that you are at about 5 minutes and I'll be encouraging you to wrap up.

Our next witness is Richard Hibey of the law firm of Anderson, Hibey & Blair. We're glad to have you here. Thank you.

STATEMENT OF RICHARD A. HIBEY, ESQ., PARTNER, ANDERSON, HIBEY & BLAIR, WASHINGTON, DC

Mr. HIBEY. Thank you, Mr. Chairman.

With the understanding that my statement is also in the record, let me simply say that I do not oppose the reenactment of an Independent Counsel law. I'm one of the few people who, notwithstanding a bitter experience that I had representing Clair George in the *Iran-Contra* case, feel that there is a need to continue having an Independent Counsel law on the books.

My view, however, colored by that experience as well as the representation of others in other Independent Counsel cases, is that we ought to be thinking about other safeguards in proposed legislation that would address what I think are philosophically more profound problems that the experience under the old law has presented for us.

I would argue for the establishment of a permanent Office of Independent Counsel. I believe that that should be done under the aegis of the Public Integrity Section of the Criminal Division of the Department of Justice.

Under this initiative, an Independent Counsel, who would be appointed with advise and consent, would notify the Attorney General of his intention to investigate certain matters. If the Attorney General approves this claim of jurisdiction over a specific subject matter or case, then he goes forward with his activity, and if he does not, then he can apply to the court. The court would decide whether, after hearing from the Attorney General, this would be an appropriate claim for the Office of Independent Counsel to make.

I also am opposed to any provision such as the one in the expired law for Congress to request the appointment of an Independent Counsel. Now, that comes as a direct result of the experience which I have had in dealing with what I consider the unwholesome injection of frenzied partisan politics into specifically the *Iran-Contra* cases, and even into the courtroom itself by the congressional witnesses who appeared there.

It seems to me that this particular provision of the old law, which calls for or permits a congressional request for the appointment of Independent Counsel, takes politics, shall we say, in the pejorative sense and throws it into the criminal law process, the judicial process. I think that that is a very dangerous and, as far as I'm concerned, unworkable situation.

With respect to the staffing of the Office of Independent Counsel, it seems to me, apropos of some of the comments that Professor Dash has made about having seasoned and experienced trial lawyers staffing here, that is clearly a definite need. In my view, you could draw from the Office of Public Integrity such individuals who are seasoned, experienced individuals who, once they are seconded to the Office of Independent Counsel for a specific case, could be

expected, free of conflict of interest, to perform their duties with honor and dispatch.

I think also there ought to be a limitation on costs. One of the great harms here is disproportionate spending, operating as an impetus to indict someone as a justification for the cost of investigation. That becomes, I think, a terrible situation.

I know we're not supposed to rely heavily on some of the experience, but one need only recall to mind that the costs of the Iran-Contra investigation have been put somewhere between $35 and $40 million and still counting. There is no Office of Professional Prosecutors anywhere in the country that I am aware of that would have ever justified this kind of expenditure for the kinds of results that were achieved or goals that were being pursued.

Apropos of the cost factor, I think Congress ought to consider a provision whereby any individual who is targeted, or a subject or, if targeted and indicted, acquitted, be able to reclaim his legal fees.

The debilitating effect of going through one of these things, especially where the targets of these prosecutions are career government servants, is stunning. As we see the cases developing through the special division of the court of appeals, the court of appeals judges rely heavily on the language of the legislative history of the old law that says attorney's fees should be granted only in rare cases, and indeed, it is becoming an increasing rarity that such applications are being honored.

With respect to the matter of money as well, it seems to me that at criminal trial itself, the playing field should be made level and that certain considerations of expense be accommodated for the defendant who is a government servant and who is on trial.

I think also there ought to be time limits built into this process. That, I think is a very difficult thing for us to consider in terms of affirmative legislation. You can't, for example, put a time limit on a case, but I think you can put a time limit on the term of an Independent Counsel, and if he hasn't completed his business within his term, then the matter could be remanded to the Public Integrity Section for further administration. By that time, the case will have had a life of its own and the prospect of conflict or even the appearance of conflict will have disappeared.

Lastly, may I suggest that more care should be taken in selecting Independent Counsel. Retired Federal judges are men of unquestioned integrity. There's no question about that. But my own personal view is I don't think they necessarily make ideal Independent Counsel.

Now, retired judges have typically spent many years being neither prosecutors nor defense attorneys, and I think, at least based on my experience, the lack of that kind of pointed experience is something which creates a problem.

Standards ought to be developed by which such appointments are made if the legislation you are about to renew stays with the appointment provisions of the old law. On the other hand, if you establish a permanent office with an appointment with advise and consent, then there is no need to delve into the problem of judicial appointment of Independent Counsel.

That pretty much summarizes some of the recommendations that I have based upon the experiences that I have had, both in the Iran-Contra and in other Independent Counsel investigations.

Mr. BRYANT. Thank you very much, Mr. Hibey.

[The prepared statement of Mr. Hibey follows:]

STATEMENT OF RICHARD A. HIBEY*
TO THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
MARCH 3, 1993

I represented Clair George, who was twice-tried in a prosecution brought by Lawrence Walsh and his Office of Independent Counsel (OIC). The opinions expressed herein reflect in part the product of that experience.

The confluence of a flawed concept embodied in the now-expired independent counsel law and the prosecutor's philosophy of enforcement resulted in an abusive, amateurish, arrogant, costly and protracted process of investigation and criminal prosecution.

THE CONCEPT

It serves no purpose to regale the Committee with examples of real or perceived abuses during the prosecution of my client in the Iran-Contra affair, or, for that matter, in the investigation of conduct during the tenure of former HUD Secretary Samuel Pierce. Opposing sides would simply continue to disagree about the meaning of such episodes.

The real problem with the expired independent counsel law and its implementation lies in the failure to understand that its premise is political. That political predicate is lodged in

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the right of the Congress to request the appointment of an independent counsel. It is this provision that projects into the criminal process the specific demands of some but not most of the members of Congress at a time when politics - in the pejorative sense of the term - is inseparable from any wholesome motive for requesting the initiation of a criminal investigation. Nowhere is that more evident than in the Iran-Contra affair.

In the Iran-Contra affair, an outraged, predominantly Democratic Congress was locked in the most heated hemispheric dispute of the eighties with the Reagan administration: the question of military aid to the Contras. Indeed, Congress succeeded in passing a complete ban on military aid, the Boland Amendment, as a rider to the reauthorization bill that provided continued funding for the daily operations of the U.S. Government. Because of the use of a rider, President Reagan signed into law legislation that he would have otherwise vetoed if it had been presented to him as a separate bill.

The Boland Amendment arguably was violated repeatedly. When this was revealed, Congressional members of both the Senate and the House demanded the initiation of criminal justice proceedings in lieu of Congress pursuing impeachment proceedings against the President or lesser Executive Branch officials.

Congress insisted on the criminal prosecution of whomever might have been involved even though the Boland Amendment, not

being a criminal statute, contained no penal provisions. No one could be convicted in a court of law for violating the Boland Amendment. Violation of the Boland Amendment nevertheless became a cornerstone of the independent counsel's prosecution of Oliver North. The independent counsel's raison d'etre was both publicly and within his own ranks perceived to be the criminal prosecution of those who violated a law that was not a crime.

THE PHILOSOPHY

The disaster of this seven-year prosecution was assured by the philosophy of Lawrence Walsh himself. He believes that our constitutional system of checks and balances is enforceable by the criminal law. This is a stunning proposition, having no basis in law of which I am aware. It is powerful evidence of Walsh's predisposition to bring criminal prosecution against all those involved in the Iran-Contra affair. In part, it explains his obsession with his central but wholly unproven belief that there was a massive, orchestrated cover-up of Oliver North's role in the resupply of the Contras -- a cover-up that reached into the Oval office. That is why Walsh has been in business for seven years. Yet during all of this time, he never alleged, except in his Christmas Eve press conference, and he has never proved the existence of that so-called conspiracy.

With such an enforcement philosophy, it became a simple theory to use the power of the subpoena to rummage through

millions of documents of various government agencies. It easily followed that career government employees, who served the nation with great distinction but who were without personal financial reserves for their legal representation, would be haled into Walsh's office, sometimes more than two dozen times, to be questioned. Nor did Walsh's staff ever pause to consider the propriety of their continued refusal to give the OIC's clearance to individuals seeking employment elsewhere in the government or timely promotion in the U.S. military simply because the individuals did not provide, in the OIC's view, sufficient useful information.

Thus, is it any wonder that Oliver North, John Poindexter, Clair George, Duane Clarridge and Casper Weinberger should be subjected to financially debilitating prosecutions? Is it any surprise that Walsh, with his unlimited budget, responded to the claims of ruin attendant to defending one's good name by saying that the putative defendants need only have plead guilty and be spared the expense?

In the case in which I was involved, there was no careful deliberation, no vetting through higher authority, leading to the decision to retry Clair George. Retrial of Mr. George was based on nothing more than a burning need to reverse the OIC's continuing embarrassment over a string of disappointments in court. Worse, it was fueled by the opinion that a black jury with a white foreman was easily persuaded to hang rather than

decide the case. On retrial, the prosecution consequently systematically excluded whites on the prospective jury panel, thereby assuring that only blacks would sit in judgment of Mr. George. If the racial identities had been reversed, as in the recent case of Rep. Ford, the perception of unfairness resulting from the prosecutor's use of peremptory strikes to achieve a particular racial composition on the jury would have led to a public outcry. Yet, in Mr. George's case, there was no accountability either to the Attorney General or the White House for the OIC's engaging in such maneuvering in the name of the United States.

It may be that framers of the new independent counsel law will determine that the legislation should focus on assuring that specific cases of abuse be prevented in the future. I am aware, for example, of press accounts of Walsh and his office profligately incurring expenses without appropriate accounting controls. It has been reported also that neither he nor his deputy, Craig Gillen, complied with the District of Columbia's tax laws. And there is also the serious report that unnamed members of Walsh's office grossly violated national security laws concerning the safeguard of classified documents and then covered up those violations for several days. If these allegations are true, criminal prosecution or civil enforcement proceedings should proceed along traditional lines of law enforcement.

The reality is that safeguards against a repetition of those alleged irregularities presently under consideration by the Subcommittee directly prevents the next independent counsel from repeating the unacceptable experience of the Iran-Contra prosecution process. A law resurrecting the independent counsel must address the larger questions affecting prosecutions, such as accountability, duration, cost, and insulation from the use of the independent counsel to further the agenda of one political constituency against another.

PROPOSED SAFEGUARDS IN A NEW LAW

I would argue for the establishment of a permanent office of independent counsel under the aegis of the Public Integrity Section of the Criminal Division of the Department of Justice. Under this proposal, the initiative to determine whether to undertake a criminal investigation would be with the independent counsel. He would notify the Attorney General of his intention to investigate a certain matter and thereby assume jurisdiction over it. The Attorney General would then approve or disapprove this action. If disapproved, the independent counsel may apply to an appropriate division of a court with jurisdiction to accept or reject the application. The standard for acceptance would be probable cause with the court deciding the issue after having heard the Attorney General's position.

There would be no provision for Congress to request appointment of independent counsel. My preference furthermore is not to provide for a mechanism whereby independent counsel must formally respond to any Congressional request for an investigation by that office. This is a direct response to the unwholesome injection of frenzied partisan politics into the Iran-Contra cases, and even into the courtroom. Congressional witnesses in both of Mr. George's trials, with the exception of former Rep. McHugh, demonstrated an astonishing partisanship and disregard for the judicial process. Thus, I would affirmatively seek elimination of a congressional request mechanism unless the jurisdiction of the independent counsel is expanded to include the Congress itself.

Staffing of the office of independent counsel should be with professional prosecutors from the Public Integrity Section. Such prosecutors not only have experience on which to draw in making judgments whether conduct by an Executive Branch employee crosses the line dividing political hardball and criminality, they also are free of the temptations inherent in having only one case to investigate. The office should not be staffed with individuals who are prepared for whatever reason to leave their primary employment to assume a temporary position that clearly requires the highest degree of professional experience and judgment. By this I am not suggesting that each prosecutor on the Clair George team joined Walsh's staff for the wrong

reasons. I still do not know what motivated them. What is clear to me, after more than 25 years of criminal law experience, is that these extraordinarily intelligent and very zealous young lawyers had no experience of the kind necessary to make the judgment not to prosecute. Certainly, they would not look to Walsh for such leadership; since not only was he without such tested experience, but his travel records apparently reflect that he spent only a portion of his work week in the District of Columbia.

There must be a limitation on costs. I have no specific proposal on this but the cost of more than $40 million spent for the results Walsh's office will claim obviously demand a more professional cost-sensitive approach to investigating cases within the independent counsel's jurisdiction. One of the great harms of such disproportionate spending is that the impetus to indict someone as a justification for the cost of investigation becomes overwhelming.

Apropos of the cost factor, Congress should consider a provision that allows any individual who is the subject or target of an independent counsel investigation to recover his legal fees if he is not indicted, or if indicted and acquitted, to recover his legal fees as well. Current decisions by the special division of the D.C. Circuit Court of Appeals that hears attorneys fees requests set an unreasonably high standard for the recovery of such fees. It might be that such a provision

will have the same restraining effect as an offer of judgment has in civil practice. Indeed, something must be done to bring equity to what is otherwise certain financial calamity for most people and, certainly, all career federal employees.

Further on this matter of money, during the criminal trial itself, the playing field should be made level. In Mr. George's second trial, we had no money to pay for a trial transcript. The OIC did. Typically, all government employees prosecuted by the independent counsel will have no ability to match the prosecutor's resources. It seems only fair that such a defendant should have the same access to a transcript as his prosecutors. Accordingly, I recommend that provisions be written into the new law that grant to indicted employees certain financial accommodations regarding subpoena costs, expert fees, transcript costs and the like to minimize the burden on their defenses.

There must be time limits built into this process. Seven years for Iran-Contra, for what it achieved, is absurd. Even now, the HUD independent counsel investigation is stretching into its fourth year. Admittedly, investigations the independent counsel typically conduct take time. Instead of imposing a time limit on the cases, perhaps the tenure of the independent counsel himself should be limited to a certain term. At the expiration of that term, the investigation would be

remanded to the Public Integrity Section for further administration.

More care should be taken in selecting an independent counsel. Retired federal judges are men of unquestioned integrity. I am not sure they make ideal independent counsel. From what I can tell of the present selection process, no emphasis, or, perhaps, not enough emphasis is placed in the need for lawyers with active prosecution or defense experience to be considered for these appointments. Retired judges have typically spent many years being neither prosecutors nor defense attorneys. Their perspective as judges is not necessarily suited to the work of investigation and prosecutorial determinations. Standards should be developed by which appointments are made. They need not be enacted into law. Of course, in a scenario calling for a permanent independent counsel, it may be that the appointment process can be taken away from the judiciary altogether in favor of an appointment, with advice and consent of the Senate, by the President.

Mr. BRYANT. Our next witness is Terrence O'Donnell of the firm of Williams & Connolly.

STATEMENT OF TERRENCE O'DONNELL, ESQ., WILLIAMS & CONNOLLY

Mr. O'DONNELL. Thank you very much, Mr. Chairman.

I appreciate the opportunity to testify today on H.R. 811 and I commend the committee for inviting trial lawyers to testify so that they can share with you their perspective from the trenches, from the battlefield in terms of dealing with the Independent Counsel.

While I'm well aware that there is significant legislative momentum supporting reenactment, I would respectfully urge that the Congress refrain. Simply put, in my view, the statute is unnecessary and, indeed, unwise. It undermines and strains and confuses the traditional constitutional roles of coequal branches of government.

Despite laudable efforts to legislate reforms, the bill still permits the creation of an institution which is by its very nature unaccountable and uncontrollable, an institution that is subject to great abuse and that is uniquely alien to our constitutional system of checks and balances.

Over time, it will do more harm than good, and I would note with great interest the testimony of our lead witness today, who I think identified very succinctly some of the constitutional problems that we face with respect to separation of powers when we try to fashion or create an institution that was not envisioned by the framers of the Constitution.

I say the statute is unnecessary because in 99 percent of the cases, the professionals at the Department of Justice are fully capable of investigating and prosecuting high-level officials.

I say this based on my observations in private practice in the Iran-Contra investigation and in representing witnesses and defendants in other Independent Counsel cases, and also from the perspective of having served for 2½ years as General Counsel of the Department of Defense, where I've seen the statute Independent Counsels from the perspective of the Government.

To say that our Government officials are not able to handle this duty is really, in my view, and with all due respect to Professor Dash, to question their integrity and judgment and professionalism where, in my view, there is no proven basis to do so.

I'm ready to admit and acknowledge and I think we all acknowledge that there are instances, where the Attorney General cannot lead the investigation, and in those rare instances when someone outside Justice is needed, the Attorney General has ample authority to name a special counsel who will operate within the executive branch, but because of the appointees reputation, stature, and significant assurance of independence, can easily fulfill the job.

Lawyers at the Department of Justice are trained to avoid conflicts, as all lawyers are, and can be expected to act accordingly. We must assume that our Attorney General and our professional prosecutors are capable of exercising good judgment and are capable of recognizing conflicts when they exist.

The checks and balances to oversee their integrity and judgment, which were the checks and balances envisioned from the beginning

of our constitutional experiences are the vast investigative authority and powers of Congress, the press, and ultimately the electorate. I think that's enough.

If, indeed, a statute is to be reenacted, what can be done to ensure that abuses that have occurred in the past do not recur in the future? And I might add that I speak to this based on observations of Independent Counsels and of enumerated abuses which, in my experience, collectively, have never been perpetrated by professional prosecutors of the Department of Justice.

There are several provisions that will improve the statute. One is to require that the Independent Counsel have substantial experience in criminal litigation, either as a prosecutor or as a defense counsel, or preferably both. I share Mr. Hibey's views about judges who have amassed great experience but are not necessarily in a position by virtue of a lack of live experience to lead a prosecution.

Second, require that the Independent Counsel adhere to the Department of Justice, fiscal, personnel travel, administrative, per diem and security policies. This will not encumber their independence.

Third, require the Independent Counsel to adhere to the maximum extent possible, and to explain where deviations are necessary with the DOJ prosecutorial manual and prosecutorial guidelines.

Fourth, require full accounting of all expenditures associated with each Independent Counsel, including the vast hidden expenses that are present. This would include the expenses and costs of all of the agents, of their services, of the DOJ support services and, to ensure that Congress and the public have an accurate picture of the cost of an Independent Counsel.

Fifth, standards should be set for periodic reappointment of the Independent Counsel. It's not enough to say that the appointment will expire in 2 or 3 years and that the court can reappoint. Congress should set specific standards for reappointment. The court should be required to consider the cost, the benefits to the public, the gravity of the crimes being investigated and the effect on the targets of the investigation. All of those are proper factors for prosecutorial discretion and they should be considered at the time of reappointment.

Sixth, legal fees: I agree with Mr. Hibey on this. The cost of dealing with a prosecutorial force that at one time numbered 32 lawyers and 50 agents full time, I can tell you, is immense. Very few Americans can afford to defend themselves, and if they are indicted and subsequently acquitted, no fees and costs may be paid under this bill. So, this legal fee issue should be dealt with and those who are acquitted should receive their fees.

Finally, I agree that if there is to be an act—and again, I'm against it—it should be made fully applicable to Members of the House and Senate. I think that that will send a message to the American public that there is equality and fairness in that approach.

I had hoped to enumerate some of the abuses that I have observed. I'll refrain from doing that because of time. But I would like to submit them for the record.

Mr. BRYANT. Thank you very much.

[The prepared statement of Mr. O'Donnell follows:]

PREPARED STATEMENT OF TERRENCE O'DONNELL, ESQ., WILLIAMS & CONNOLLY

Thank you for inviting me to testify on H.R. 811. While I am well aware of the significant legislative momentum supporting reenactment, I respectfully urge the Congress to refrain. Simply put, the statute is unnecessary. It undermines and confuses the traditional constitutional roles of co-equal branches of government. Despite laudable efforts to legislate reforms, the bill still permits the creation of an institution which is by its very nature unaccountable and uncontrollable -- an institution that is subject to great abuse and that is uniquely alien to our constitutional system of checks and balances. Over time, it will do more harm than good.

I say the statute is unnecessary because in 99% of the cases, the professionals at the Department of Justice are fully capable of investigating and prosecuting high level officials. To say they are not is to question their integrity, judgment and professionalism where there is no proven basis to do so. In those rare instances when someone outside of Justice is needed, the Attorney General has ample authority to name a special counsel who will operate within the Executive Branch. Lawyers at the Department of Justice are trained to avoid conflicts of interest and can be expected to act accordingly. We must assume that our Attorney General and our professional prosecutors are honorable and capable of exercising good judgment. The checks and balances to oversee their integrity and judgment include the Congress, with its vast investigative powers, the press and, ultimately, the electorate. That is enough.

Let me take you to the battlefield trenches for a moment to share with you some of the abuses perpetrated by the Independent Counsel during the Iran-Contra investigation and our representation of Col. North. It is there that one may see enormous power run amuck.

Point One -- ready, fire, aim. The Independent Counsel is staffed with volunteer prosecutors who join the hunt for a crime after the target is identified. This is not unlike the vigilante practices of the old west. It distorts the prosecutorial function to the great detriment of the target.

Point Two -- cost is no limit. The Iran-Contra Independent Counsel is the largest prosecutorial force ever assembled in our nation's history. No cost is too great -- no lead to expensive to follow. The IC admits to spending about $35 million, but most of the costs are hidden. If the hidden costs are considered, such as the cost of the legions of government officials at DoD, CIA, NSA and State to respond to the independent counsel's insatiable appetite for documents, $100 million is closer to the mark. Since there is no incentive to finish, the bureaucratic tendencies to prolong and dig in are given full flower. The IC takes on the trappings of a permanent agency The average cost per criminal defendant in U.S. Attorney's Offices is about $10,000 -- the Walsh team was averaging about $2.5 million per defendant!

Point Three -- the army assemblies. By our count 70 lawyers have served in the Walsh office since he began six long years ago. In the North case alone, 40 IC lawyers appeared on the pleadings. More than 50 FBI, IRS and Customs agents were dispatched around the globe to gather evidence. While the average assistant U.S. Attorney (one lawyer) handles more than 100 cases per year, the entire Walsh staff produced 14 pleas or indictments in six years. And when the Walsh army was deemed inadequate, they brought in the reserves -- former federal judges and law professor consultants from Harvard, Virginia and Columbia. These numbers give one the sense of the enormous and disproportionate fire power focused on a handful of individuals.

Point Four -- birds of a feather. I'll be very blunt about it; the makeup of the IC team is highly suspect. The volunteer lawyers tended to be predominately liberal and quite hostile to the Reagan Administration and its policies. Many viewed their service as a crusade. This is unprofessional and plainly wrong. There is no room for that sort of rank bias in the prosecutorial function.

Point Five -- salaries galore. Youngsters just one or two years out of law school were paid at or near the top of the government scales, while career government lawyers labor for many years to reach these heights. This is a blatant and unjustified distortion of the government compensation standards.

Point Six -- don't forget the press. At the high water point the IC had three full time press aides. They helped to shape the story and engaged in "spin control" in the court house halls during trial as if it were some sort of political contest. Why are the taxpayers paying for prosecutorial press aides? And why were press aides sitting in during closed hearings where the court considered questions relating to the use of classified information?

Point Seven -- the microscopic exam. With no limit on funds or personnel, no detail was too trivial to escape the x-ray examination of the IC. Like a CAT SCAN of the human body every word and every document was scrutinized. Col. North's wife was called to the grand jury. Her sister was interrogated about how much it cost to feed their daughter's horse. The North's babysitter and the teenager who mowed the lawn were questioned about how much they were paid. Col. North's minister was asked how much the North family contributed on Sunday. The veterinarian's records were examined to ascertain how the family dog "Chewy" died. They even subpoenaed Col. North's lead attorney, Brendan Sullivan, to appear before the grand jury.

Point Eight -- find a crime to fit the target. The results of all this are inevitable; there are going to be indictments even if the theories are novel. For example, most people think Col. North was indicted for lying in sworn testimony before Congress -- not so. He was charged with lying at a meeting when he was

not under oath and where there was no transcript. If this theory of prosecution spreads, we won't be able to build enough jails in this city to hold would-be offenders. Two individuals pled guilty on tax law theory that the Assistant Attorney General found highly dubious, if not inappropriate. And what about the IC's insistence on trying to prosecute Col. North and others after they were compelled to tell their story to Congress before the world's television audience. We told the IC five years ago that this would not pass constitutional muster, but he insisted on going forward, wasting millions along the way, only to find that he was wrong. No professional prosecutor would have engaged in such folly.

Point Nine -- unjustified targeting. A prosecutorial force of this size loses all perspective. Having recruited this army (for the most part untrained) the need for results begins to override good judgment. Unlike a U.S. Attorney who must spread precious resources over a wide range of criminal activity and exercise prosecutorial discretion to carefully identify worthy cases, the IC has no other cases that need attention. The inevitable result: bad judgment or no judgment at all and abject disregard for the rights of the targets along the way.

Point Ten -- further abuse. Throughout the investigation, the IC showed a callous destain for properly classified national security data which he referred to as "fictional secrets." Finally, the IC intends to issue a report to do what he could not do in court. It will be a "final shot" -- a mammoth document assessing blame across

government. But who can fight back -- who can amass the funds to rebut such a report? What about reputations and notions of fairness? And what about the congressionally mandated grand jury secrecy rules? Why should grand jury material be included in such a report?

If Congress should decide to reauthorize the independent counsel statute, what can be done to reduce the chance that these abuses will recur? Remember, you are providing all the authority and power of the Attorney General to a single, unaccountable individual. There are several provisions that will help.

- Require the IC have substantial experience in criminal litigation as either a prosecutor or defense counsel.

- Require the IC to adhere to DoJ fiscal personnel, travel, administrative and security policies.

- Require the IC to adhere to the maximum extent possible to the DoJ prosecutorial manual and guidelines.

- Require full accounting for all expenditures associated with the IC, including the cost of agent services and DoJ support services, to ensure accurate cost records.

- Set standards for periodic reappointment of the IC. The court should be required to consider the cost, the benefits to the public, the gravity of the crimes being investigated, and the effects on the targets of the investigation.

- And, if there is to be an Act, make it fully applicable to members of the House and Senate.

Mr. BRYANT. Our next witness is Tom Wilson of the firm of Seyfarth, Shaw, Fairweather & Geraldson. Thank you for being here.

STATEMENT OF THOMAS E. WILSON, PARTNER, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

Mr. WILSON. Thank you, Mr. Chairman.

My name is Tom Wilson. I am a partner in the Washington office of Seyfarth, Shaw, Fairweather & Geraldson. I have prepared a written statement and submit it to the subcommittee, and I would assume that it would be made part of the record of the proceeding.

I'm going to depart from the text. I understand that the Chair does not wish to entertain war stories about specific examples that have occurred arising out of Independent Counsel cases. I will tell you that my experience, unfortunately, with the Independent Counsel statute, it relates to Independent Counsel Walsh and the prosecution in connection with the so-called Iran-Contra affair.

I think the Independent Counsels statute is a bad law. And the reason I think it's a bad law derives from the horrific experience I had while representing not only Joe Fernandez who was in essence a GS–15 level public servant, a 20-year veteran of the clandestine service who had devoted his life to the country, who had served in numerous overseas assignments with great distinctions and indeed, valor.

For Joe Fernandez to be brought back to the United States the way he was in January 1987 and almost immediately put under the steely eyed glare of the Independent Counsel and be subjected to the vast resources of an Independent Counsel who seemed determined to prosecute him, despite all the underlying facts and the implications for our foreign policy apparatus, for the intelligence community and for the ongoing ability of this country effectively to conduct foreign policy, was staggering.

The prosecution of Joe Fernandez, for the reasons that I indicate in my statement, was totally unjustified.

I have been doing primarily white-collar criminal work for approximately 10 years now. I have had a lot of dealings with a great many prosecutors. And I can honestly state that under the facts that were presented to this particular Independent Counsel with respect to this particular individual, Jose Fernandez would never have been prosecuted by a regular prosecutor.

Fernandez was never accused of personal venality or official corruption. He was accused of having made false statements to an IG investigator at CIA and to two Tower Commission investigators.

These interviews were extremely informal. In essence they were bull sessions. They sat Fernandez down and they asked him questions, very often unfocused. The interviews by the people from the Tower Commission were especially informal—an investigator was the chief investigator of the IRS; the other one was from ATF.

Neither one of the Turner Commission had a clue about how the CIA operated; what the responsibilities of a chief of station were; how he went about fulfilling those responsibilities; his chain of command and reporting responsibilities, and so forth.

In that informal environment there were some misunderstandings that translated into a feeling that somehow Fernandez had

been untruthful. Once that got to the Independent Counsel the pursuit of this individual was relentless.

Mr. BRYANT. Mr. Wilson, I want to clarify what I said earlier. I understand that you want to make a case. You're probably working up to a case that this wouldn't have happened if we had a regular prosecutor. My only concerns is there's no one here from Mr. Walsh's office to tell the other side of the story and I just don't want to have a one-sided attack on the way in which Walsh conducted the investigation.

And to the extent you can use your experience as an example for us without doing that, the Chair would appreciate it.

Mr. WILSON. OK. That's fine. And I don't mind doing that. It's just—I think that what happened in this case vis-a-vis the American intelligence community is instructive in that it shows that there's really no way to fix this law because to the extent that the counsel is independent, he's got to be truly independent.

To the extent he is independent, he's going to exercise his judgment pursuant to an agenda which is going to be different from the overall responsibilities of the executive branch of government. The executive branch of government has the responsibility of not only seeing that the laws are enforced but also for seeing that the Nation is secure.

Now, when you have the Attorney General in place making prosecutorial judgments while engaging in a dialog with the foreign policy apparatus of the Government and the intelligence community, the manner in which prosecutorial discretion is exercised is understandably going to be different from somebody whose sole focus is to get a bunch of alleged rascals and prosecute them.

In this case, I think that the damage that was done to the American intelligence community is significant and it's probably lasting. It changed the culture of the clandestine service of the Agency.

Never before in the history of this country has anybody in the clandestine service at the field officer level been prosecuted for the way that he did his job, prior to Fernandez.

The Fernandez precedent now is going to be kept in the minds of chiefs of station throughout the world whenever they're put into a situation where they have to make decisions with respect to a policy that may be unpopular with certain sectors back home, particularly in the Congress. Because of the Fernandez example, they can no longer be sure that if they take a particular action and it turns out badly for reasons that has nothing to do with the wisdom of their judgment or how they did their job, they may be personally at risk.

It is reasonable for this Government to ask Americans who serve the Nation to risk their lives for their country, and there are many Americans who are willing to do that. No government has the right, however, to ask a public servant to risk his personal honor. And that is what the Independent Counsel structure forces an intelligence officer to do; risk his personal honor. If our intelligence officers are forced to make a choice on that basis, they're going to protect their personal honor; they're going to stand back. If they stand back, there are serious potential foreign policy implications associated with that.

The President basically has three levers that he can pull to affect the outcome of foreign policy. One is the political-economic lever; the most aggressive is the military lever; and the middle one is covert action. Covert action is the responsibility of the intelligence agencies.

To the extent that the CIA is out in front and can do something that is lawful under U.S. law that will effect an outcome of a foreign policy situation consistent with U.S. foreign policy interests, the Nation benefits and the world will be a safer place if intelligence officers stand back at the wrong time because they feel like they are artificially at risk because of forces at work back home, the Nation suffers and world peace could be jeopardized as I describe in my statement was just such a case.

The Independent Counsel mechanism coupled with the Fernandez precedent, puts U.S. intelligence officers at risk. And that's why I think it's a bad law.

I know that this is a forum in which compromise is the word of the day. But I submit to you that the examples that I give are really uncorrectable.

We say we're not a government of men; we're a government of laws. But yet, when you put the wrong Independent Counsel in office at the wrong place, at the wrong time, very bad things happen the effects of which last a very long time after the Independent Counsel leaves office.

I think that has happened in connection with Iran-Contra. I think that there is a strong, clear lesson that is being preached here by the experience gained in the *Fernandez* case and I think Congress should heed it. It should not reenact the statute. To the extent that it does, I subscribe to every one of the controls that were articulated by Terry O'Donnell. I think that they're sensible and wise. But I don't think that they correct the fundamental problem.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Wilson follows:]

Before the

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENT REGULATION

of the

U. S. HOUSE OF REPRESENTATIVES

HEARINGS ON H.R. 811, THE
INDEPENDENT COUNSEL REAUTHORIZATION ACT OF 1993
(March 3, 1993)

STATEMENT OF THOMAS E. WILSON
OF SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

Introduction

Mr. Chairman, my name is Thomas E. Wilson. I am a partner in the Washington, D.C. office of Seyfarth, Shaw, Fairweather & Geraldson. I come before the Subcommittee today to share with you my views concerning H.R. 811, the Independent Counsel Reauthorization Act of 1993. My thoughts on this legislation are informed by the experience I have gained during the six years that I have served as counsel for Joseph F. Fernandez, the former CIA Station Chief of San Jose, Costa Rica who was prosecuted by Independent Counsel Lawrence E. Walsh in connection with the Iran-Contra Affair. Based upon that experience, I believe the Independent Counsel Statute was a bad law which should not be re-enacted.

Congress Should Not Re-enact the Independent Counsel Statute Because the Independent Counsel Is Accountable to No One

The Founding Fathers of this nation conceived of a government comprising three separate branches -- the executive, the legislature and the judiciary. Nothing was more fundamental to the Framers of the Federal Constitution than the concept that the powers of each of the three branches of government remain separate from one another.

The Independent Counsel Statute, however, created a fourth branch of government which, as a practical matter, was largely unaccountable either to the other three branches of government or the political processes which operate to make our public servants accountable to the electorate. The demise of the Independent Counsel legislation gives Congress an opportunity -- and, in my view, a duty -- to evaluate how the law really operated in order to determine whether its re-enactment is truly in the public interest.

Only someone who has had experience working in the field of law enforcement or as a defense counsel can appreciate fully the vast power and the immense discretion which is placed in the hands of prosecutors. In 1988, Justice Scalia reminded us of this power when he reflected on a speech delivered by Justice Robert Jackson when he served as Attorney General under President Franklin D. Roosevelt. Justice Jackson warned that

"the most dangerous power" of any prosecutor is his ability to "choose his defendants" -- that is, his capacity to "pick people that he thinks he should get, rather than cases that need to be prosecuted." When prosecutors get confused and start prosecuting people rather than crimes, it no longer is "a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm -- in which the prosecutor picks some person who he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies." Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia dissenting).

The "sin" of the Independent Counsel legislation is that a pre-selected group of high-ranking government officials identified as potential "culprits," -- usually in a highly charged political environment -- have the full weight of the federal government hurled at them with the implicit expectations that the "guilty" will be "brought to justice. "[T]he fairness of a process," said Scalia, "must be ajudged on the basis of what it permits to happen, not what it produced in a particular case." Id. at 731. Well, in the case of Independent Counsel Lawrence E. Walsh, what has been produced in connection with the Iran-Contra investigation is a case

study that illuminates the grisly excesses which the Independent Counsel process encourages.

The Prosecution of Joseph F. Fernandez

Joe Fernandez is an unlikely would-be felon. He is a husband and father of seven children. Before joining CIA, he was a policeman in Dade County, Florida. His performance had been so exemplary that, when he left, the police department retired his shield. He joined CIA in 1967. For twenty years thereafter, he served with the distinction in a series of overseas assignments and at CIA headquarters in Langley, Virginia.

From almost the moment of his return to the United States from Costa Rica in early 1987, Fernandez was pursued relentlessly by Independent Counsel Walsh for more than three years for allegedly making false statements to an officer of the CIA's Office of Inspector General and to two investigators from the Tower Commission. No professional prosecutor would have prosecuted Fernandez:

° Fernandez's alleged false statements were made in extremely informal sessions where no formalities were observed and where no transcripts were kept reflecting the questions which Fernandez was supposedly asked and the answers which he gave. Moreover, the notes of the CIA IG and the Tower Commission officers who interviewed Fernandez directly

contradicted the charges leveled at him by Independent Counsel Walsh.

° Walsh informed Congress in April 1987 that if witnesses were immunized and permitted to testify in the Iran-Contra hearings, it would be impossible later to prosecute them. Fernandez -- like North, Poindexter and others -- testified on Capitol Hill under a grant of immunity. Walsh still insisted on prosecuting him despite the fact that transcripts of his immunized testimony had been reviewed by virtually every witness that Walsh proposed to call at trial. As a consequence, Walsh knew before he started that any prosecution of Fernandez was bound to fail in the end.

° Walsh knew from the outset that any attempt to prosecute a CIA Chief of Station was going to implicate top secret information that almost certainly would not be able to be revealed at trial. Regulations promulgated by the Attorney General under the Classified Information Procedures Act require federal prosecutors before they indict a defendant to consult with the intelligence community in cases which implicate classified information. Walsh was obligated to follow those regulations yet he refused. And that refusal required Attorney General Richard Thornburgh, after Fernandez had been improperly indicted, to withhold from Fernandez classified information vital to his defense, thereby leading the judge in the case to dismiss the indictment on the eve of trial.

• Fernandez was never accused of personal venality or official corruption. In fact, he was never even accused of having violated the Boland Amendments, the appropriations measures which from time to time between 1982 and 1987 placed restrictions on funding for the Nicaraguan Contras.

The prosecution of Fernandez was a tragedy. It ruined the career of an able and dedicated public servant and left him and his family with a $1.7 million unpaid legal bill. What is worse for this nation, it radically changed the culture of the CIA's clandestine service by making an organization which was once bold and resolute, tentative and uncertain. In fact, the irresponsible prosecution of Joe Fernandez by Independent Counsel Walsh, and Walsh's manifest indifference to the national security concerns of the Executive Branch of government, may have contributed significantly to the decision of President Bush in December 1989 to launch the invasion of Panama.

The Panama Dimension

For years prior to 1989, Presidents Reagan and Bush had used every diplomatic and economic tool available to pressure General Manuel A. Noriega to relinquish power and leave Panama. Nothing had worked.

During the summer of 1989, senior representatives of CIA and other U.S. intelligence agencies were embroiled in an

acrimonious debate with Walsh over whether the intelligence community was going to release secret information necessary to permit the Fernandez case to go to trial. In October 1989, as that debate was about to culminate, several Panamanian nationals informed CIA that they were going to mount a coup d'etat against Noriega. Normally, the CIA would have promptly taken steps to facilitate the coup to minimize bloodshed and to bring about a result which was consistent with U.S. foreign policy objectives.

That did not happen. Instead of stepping forward, CIA personnel hung back. Executive Order No. 12333 expressly forbids any person acting for, or on behalf of, the United States government from engaging in assassinations. Coups are messy enterprises in which the targets of the coup sometimes get killed. If United States government representatives were to get involved in the Noriega operation, and Noriega were to be killed, American intelligence officers might find themselves like Fernandez in criminal jeopardy. Even though CIA officials had not instigated the coup, and even though the plan for the coup had not contemplated that Noriega be eliminated, were Noriega to die, the fear was that someone in Washington might charge that CIA officers had broken United States law. CIA already had one field officer in the dock; it did not want any more.

For hours, the leaders of the coup held Noriega at gunpoint. In Washington, decision-makers, many of whom were having to contend with Walsh over the Fernandez case, tried to decide whether, and to what extent, the United States might be able to be involved. In the meantime, the United States government did nothing to help bring the coup to a successful conclusion. Eventually, the coup-attempt failed and Noriega executed as many of those who had been involved as he could find.

Instead of being deposed, Noriega was emboldened. In December 1989, in a move which manifested remarkable hubris even for Noriega, he declared war on the United States. President Bush concluded that the United States could tolerate Noriega no longer and he ordered the Panama invasion.

The existence of the Independent Counsel Statute and the prosecution of Joe Fernandez in a manner that reflected a callous indifference to the national security interests of the United States had the effect of preventing the American intelligence community from seizing the opportunity presented in October 1989 to remove Noriega from power peacefully. While Operation Just Cause was ultimately successful, it cost vast treasure and the lives of 23 American servicemen and hundreds of Panamanians.

Conclusion

It is hard to imagine a clearer living example of the kind of prosecutorial excesses against which Justice Robert Jackson warned us than the record which has been amassed by Independent Counsel Lawrence E. Walsh. With the consideration of H.R. 811, Congress has an opportunity to look history full in the face and to learn the lessons which it seeks to teach. Re-enactment of the Independent Counsel Statute is not necessary. The very existence of such a law represents a Congressional vote of "no confidence" in the professional prosecutors who make their careers in the Department of Justice. There is little evidence to indicate that such lack of faith in the established processes of the Executive Branch of government are justified. Also, in a situation like Iran-Contra, the Independent Counsel Statute poses a threat to this nation's national security apparatus. Simply put, it's a bad law which should not be re-enacted.

Mr. DASH. Mr. Chairman, may I make a very brief response, because I think I would like to clarify something.

Mr. BRYANT. Can we draw it out of you in the course of questioning? In fact, I intended to defer to you in my first question.

Mr. DASH. Well, there are some things that have been said, Mr. Chairman, with regard to abuses of prosecution, which I believe are not peculiar to the Independent Counsel. Prosecutors abuse their conduct all over the country. And this room would not be large enough to house the defense counsel who would like to come before this committee and tell you what U.S. attorneys have done or counsel for the Department of Justice.

Mr. BRYANT. I understand.

Mr. DASH. And I believe that there's nothing in the Independent Counsel Act that makes this person necessarily such an evil person.

He has the powers of the Attorney General. And I suggest he's just as accountable as the Attorney General.

Mr. BRYANT. The Chair recognizes himself for 5 minutes.

Mr. Wilson, when you said in the course of your testimony there that the person involved in clandestine service when faced with questioning from another agency is going to stand back, what did you mean by that?

Mr. WILSON. No. What I meant by that, for example, in the situation that occurred in Panama, when some folks came to the Agency representatives down there and told them that they were going to effect a coup against Noriega, that was an initiative that was completely consistent with the U.S. foreign policy articulated by two American Presidents, Reagan and Bush.

But yet, instead of jumping into the situation and trying as best as possible to facilitate the coup to reduce the chance of bloodshed on the one hand and facilitate an outcome consistent with U.S. foreign policy on the other, the CIA pulled back and called the lawyers instead of doing the job you folks appropriate money for them to them to do.

The individual who was down there making those decisions with respect to the Noriega coup had been Deputy Chief of the Central American Task Force in Iran-Contra. He knew very well what was going on with respect to Fernandez. He no doubt was worried that if something bad went wrong and Noriega were to be killed someone in Washington might later say that Executive Order 12333 which explicitly prohibits any U.S. official from being involved in an assassination had been violated.

The CIA personnel involved might, like Ferandez, get criminally prosecuted. Because of the Independent Counsel statute, there was no one in Washington that could give CIA the cold comfort they needed to help in the Noriega coup succeed. And it failed.

I believe, the responsible decisionmakers could see in their mind's eye what had happened with Iran-Contra. Members of Congress would call for an Independent Counsel. An Independent Counsel would be appointed. The next thing you know, the chief of station down there is yanked up to Washington and he's put under a white light. His career is ruined and so on and so forth. That's what I meant.

Mr. BRYANT. But stand back, you mean he's not going to talk? Is that what you mean?

Mr. WILSON. No. What he's going to do is he's going to send a cable to Washington saying you folks up there take the responsibility for this. You give me very explicit instructions as to precisely what I can do and cannot do. And until I get those instructions, I'm prepared to do nothing.

Mr. BRYANT. Is that bad?

Mr. WILSON. Yes. I think it is bad because you train these chiefs of station. Difficult and fast-moving situations like a coup cannot be effectively micromanaged from Washington. Chiefs of station are people who have tremendous experience in the intelligence business. You have to put them out there. You have to give them a broad amount of discretion within the framework of the law and you have to trust them, Mr. Chairman. And that is how the Agency is most effective.

If you shackle them so they can't make a move without checking with the front office, what you've got is a bunch of bean counters, not intelligence officers. And that's not a good thing.

Mr. BRYANT. But why is this not a problem with the Justice Department, as well? I don't understand why it would make any difference. The career prosecutors in the Justice Department, many of them came in under Presidents of different parties and survived 10, 15, 10 years. Their political views are not known by anybody in particular and there's no reason for the chief of mission or the chief of the intelligence operation down there to have any more confidence in someone at that level than he would a special prosecutor. In fact, maybe less confidence.

Mr. WILSON. That's not true, Mr. Chairman, with all respect. It's the same chain of command. The chief of station reports to the task force chief, who reports to the division chief, who reports to the DDO, who reports to the Director, who reports to the President.

Now, the person who works for the President, the Attorney General, is going to make the decisions as to whether any misconduct or criminal conduct has taken place in the context of a fluid and, by definition, dangerous situation.

When you're talking about the Central Intelligence Agency—understand this. We are sending people abroad to commit espionage.

Mr. BRYANT. We understand that. I'm just asking if your comment didn't just make the best case for the special prosecutor. You in effect pointed out they're in the same chain of command, which is exactly what the special prosecutor statute is designed to remedy.

Mr. WILSON. They are in the same chain of command. Intelligence officers can only operate effectively if there is a level of certainty with respect to the rules of engagement. So, the judgment associated with whether particular conduct is the kind of conduct that should be criminally prosecuted is informed by the foreign policy responsibilities of the President, the Attorney General and the intelligence community can do their respective jobs in ways that benefit the Nation as a whole.

When you move those judgments across the street, as it were, to an Independent Counsel, I submit to you that the judgments that are being made run the risk of being made with an indifference to-

ward legitimate foreign policy concerns thereby adversely affecting the interests of the Nation as a whole.

Mr. BRYANT. But how do you deal with the fact that any President under those circumstances or his Attorney General can then hide behind what might appear as foreign policy concerns, if not further investigated, to avoid prosecuting something which in fact would not jeopardize foreign policy concerns at all, or even if they would, should be prosecuted anyway.

Mr. WILSON. No system is perfect, Mr. Chairman. The President lives in a political world. To the extent that it becomes clear and a case can be made to the American people that someone has violated the law and that the President has let the kind of conduct go on within his administration which is untoward and unacceptable to the American electorate, I'm reasonably confident the American people are going to rise up and vote him out of office.

Mr. BRYANT. OK.

Mr. WILSON. Alternatively, to the extent that he doesn't the excesses of the President are sufficiently extreme, Congress can get involved through the impeachment process.

Mr. BRYANT. Mr. O'Donnell, you mentioned something along the same lines as the remarks that he just completed when you said there really is no basis to question the motivations of any Attorney General. But I wonder if both parties have not had circumstances like that.

For example, it would be hard to envision Robert Kennedy being enthusiastic about a prosecution of someone who is very close to his own brother, who was the President. And I think Attorney General Meese, having been essentially a campaign political functionary for many years for President Reagan, rather than a noted lawyer, it's pretty hard to imagine him—in fact, I think we saw that he was not able to be very objective with regard to the Reagan administration.

Mr. O'DONNELL. Mr. Chairman, I agree that there are occasions that arise where the Attorney General should not be conducting the investigation or that it should not be conducted under his direct supervision. And the only thing that I suggested was that in those cases I favor the naming of a prominent lawyer with litigation experience to be a special counsel within the executive branch to conduct the investigation.

And if such a person is "cooking the books," there will be hell to pay. I think the political system will monitor that. And while I agree with Professor Dash that most of the Independent Counsels have done a very fine job, some clearly have not.

The problem with the institution is that once you have one that's not doing the job properly for whatever reason, then you've created a monster. And there is no practical way of reigning this person in, even under these good proposals in the legislation to implement controls. By his nature, he is independent.

And my view, having seen abuses which have driven home this position to me, is that it's not worth the risk. I would much rather go with special counsel appointed within the executive branch than to have an Independent Counsel who is unaccountable.

But if you do it, I think you can put things in the statute that will help to lessen the chance that there'll be abuse. You've got

some good ones in there now and I think some of the ones that this panel has mentioned will add further protection to the statute.

Mr. DASH. Mr. Chairman, if you raise a monster, the Attorney General can fire him for cause. It's in the statute. And this committee, and also the Congress, can call him before it.

It seems to me there is a way to expose a monster and get rid of him.

Mr. BRYANT. Very well.

Mr. Gekas.

Mr. GEKAS. Yes. I thank the Chair.

With respect to the last description by Mr. Wilson of a case that would involve foreign policy implications, does Mr. Wilson see a difference between that kind of case—and I agree with his contentions totally about the political responsibilities of the President, national security and all of that—with a difference in that type of situation from one where a Cabinet official is accused of financial wrongdoing, having no implications at all with foreign policy?

There you can see probably a justification for either a special counsel to be appointed by the Attorney General or Independent Counsel that would have no fractious impact on political and geopolitical and foreign policy considerations; do you not?

Mr. WILSON. Yes. And I think, though, that Mr. O'Donnell's proposal would work perfectly well. I mean, the President is under enormous political scrutiny when the conduct of one of his Cabinet officers is called into question. And I don't think that—there aren't a lot of President, I think, that will risk their political name in history to, quote, "save the bacon of one of the members of the Cabinet."

To the extent that there is a legitimate concern that's been raised about it, appoint an Independent Counsel within the structure of the Justice Department under the Attorney General and let him do an investigation.

Mr. GEKAS. But the President, can he not, invoke national security considerations as a defense and even cloak his subordinates with that defense, can he not?

Mr. WILSON. The President can. But once again, to the extent that his arguments are hollow and can be manifested as such by the press and by the political process that occurs and the dialog between the executive and legislative branches of government—you know, there are very few secrets that are successfully maintained in Washington. And the American people have pretty good sense of what's really going on. They're very hard to fool in the long run.

And to the extent that a President were to try to use national security or foreign policy considerations as a shield, I think it's very unlikely that he would be successful.

In the Watergate situation, Mr. Nixon tried that and nobody was convinced. There was a process that was in place that unmasked those claims for what they were. They weren't successful.

Mr. GEKAS. Mr. Dash, you and I in a previous deja vu type of situation argue a little bit about the inclusion of Members of Congress in the overall target area, the categories can be subjected to an Independent Counsel investigation.

In your testimony today I noted every time you mentioned perception—I think it was about six or seven times—that what you

felt perceived to be fair, perceived on political pressure, perceived abuse. You used that.

That has been my justification right along the line in this whole picture of trying to include Members of Congress as a stated category even though they themselves become a hybrid group not executive in type.

Independent Counsel itself is a hybrid group that we're willing to sustain. If the perception of the public is that Members of Congress somehow are treated as a special immune class from the type of prosecution that is visited against Cabinet members, isn't that, along with the safeguards that will be applied to them as targets as to anybody else—isn't that perception worth including them as the possible targets?

Mr. DASH. I would agree if that was the perception. I'm not saying that the public has certain perceptions, real and unreal, about Congress. What I am saying is that I don't believe—and I haven't found anywhere in this country where I've gone, a perception that the Independent Counsel legislation makes the Congress privileged.

Number one, the very basis for the Independent Counsel is the conflict of interest, real or perceived. I don't believe there is even a perceived conflict of interest between the Department of Justice or the Attorney General and wrong doing by a Senator or a Congressman.

Nevertheless, if there is, the legislation does permit an Attorney General to ask for an Independent Counsel where the Attorney General believes that there would be such a conflict. So the legislation carries it.

My problem with making it mandatory is: Is it unnecessary to the philosophy of the legislation? I don't think it is necessary to deal with perceived lack of confidence, or perceived injustice with regard to the Congresspeople.

It seems to me that even if you put it in, it would be words on paper because I really don't believe any Attorney General is going to be asking for Independent Counsel to investigate or prosecute a Congressman where there is, in fact, no conflict.

We've heard that the Attorney General doesn't like Independent Counsel. They don't want to delegate to Independent Counsel their responsibilities. The whole history has shown that Attorneys General where they believe it's necessary have had no fear or concern about investigating or prosecuting a Congressman.

So, what you will have is a legislation that won't be implemented at all. You do have a provision in the present legislation that leaves it to the discretion of the Attorney General to——

Mr. GEKAS. Why have that at all under your premise?

Mr. DASH. No, no, no.

Mr. GEKAS. Why even have that if the authorities there and the circumstances that you feel could arise, why even have what is in the main bill, the "may" language——

Mr. DASH. Because there may, in fact, be situations where a particular Attorney General will have a conflict of interest with a particular Congressman.

Mr. GEKAS. But that could be accomplished even without the "may" language that's included in the bill; isn't that correct?

Mr. DASH. If the Attorney General wants to do that on his own.

Mr. GEKAS. All right, then why, if not for perception purposes, do we have this "may" language that is acceptable to you?

Mr. DASH. Fine, if——

Mr. GEKAS. If that is a perception cure, why not put it in the body of possible targets that would end forever the perception problem?

Mr. DASH. Because I think that does address—and I think you're correct—that does address a perception that an Attorney General may not recognize the conflict where it's a Congressman.

So, it's put in the bill to say that he has a discretion to do so. I believe it goes beyond any perception in the public today about Congress being left out of this legislation to require, in order to correct that perception, to make it mandatory. I just don't think you're doing anything that's worthwhile.

Mr. GEKAS. Well, then you would advocate even deleting the language that's already in the present bill?

Mr. DASH. It wouldn't bother me very much, but I think it's good that it's there.

Mr. GEKAS. But you don't think it's a little better if it's put in the categories of possible.

Mr. DASH. I think making it mandatory is, in a sense, diluting the purpose of the bill. By the way, as I said, it's strange to hear any former Attorney General, or Attorney General argue before this committee, that if you're going to have an Independent Counsel, make it mandatory to include the Congress.

What the Attorney General and the Justice Department, and all those who supports his position say is, "We consider this bill an insult to us. We can do it."

It's completely contradictory to say, "We can do, but if you're going to make us do it, take away more of our power and force us to use Independent Counsel in investigating Congress." I just think it dilutes the purpose and makes it unreasonable.

Mr. GEKAS. That's a half a glass of water that you're talking about. The Attorneys General who have testified in favor of including Members of Congress have said, "If we're going to have this power for executive members, we should also have it for Members of Congress."

Mr. DASH. No, they have the power. I wouldn't make it mandatory on them. I suggest to you that those Attorneys General who said that to you—and I do it with respect—did not say it honestly. They were saying it in order to so scare the Congress.

Mr. GEKAS. They were saying it in the same fashion as the three gentlemen who accompanied the panel that if we're going to have this type of legislation, we should take into account the possible conflict of interest that propels the appointment of an Independent Counsel when an executive member is the target to that situation where conflict also is apparent, if not real, when the Attorney General and a Member of Congress are of the same party, shall we say, or of such a powerful individual in Congress that the duties and the fiscal responsibilities of the Attorney General might be supportable by this individual Member.

The conflicts that can occur there are those that are just as real and perceived, if not real, by the public when news accounts would

come out on such a situation, that they should be included—powerful Members of Congress or not so powerful—in the category of targets.

Mr. DASH. Well, the only difference is that where you have high executive branch officials charged with crime, it's not a possible conflict. It's not a perceived conflict. It's a real conflict. It's always a conflict. Always.

Mr. GEKAS. But you still place a lot of weight on perception, and yet——

Mr. DASH. I know I did. But where I placed it on perception was that even where you had an honorable Attorney General with integrity and courage who, despite the conflict, is perfectly willing to go ahead and investigate the President, no one is going to believe him.

Mr. GEKAS. One quick question, if I may, if the Chair would permit me, to Mr. O'Donnell, could you tick off one or two of the abuses that you've observed?

Mr. O'DONNELL. It's in the testimony which I will submit. There are many, but to start, the strange thing about the Independent Counsel is that prior to appointment the target is identified. Then you form up a team to try to find a crime to pin on the target.

This turns the traditional prosecutorial function upside down. It's a distortion, in my view. Quite frankly what happens when you have a politically charged case, like Iran-Contra—and this is documented in the books and articles of one or more of the former prosecutors on that team—is that you get a group who come in because they are interested in prosecuting this case because they have philosophical bias against the Reagan administration or its policies in Central America, et cetera.

They join up. They volunteer. No other prosecution is initiated in this way. In the U.S. attorney's office you have a professional corps of prosecutors. The case is assigned to one of them. Others are assigned to assist. You may have one that's been there 20 years, one 5 years—a mixed group of professionals. Here you have a voluntary team. It's not like the vigilante practices of the old West. It's not right, in my view.

We've talked a great deal about the costs. I contend that if you considered the hidden costs, the $35 million which Iran-Contra acknowledges, would become closer to $100 million. Why? Because legions of employees—and I saw this at the Department of Defense—are required to fulfill the insatiable appetite of the Independent Counsel for documents and information. These costs were not tabulated. It costs $10,000 for the average prosecutor to prosecute a criminal case. In Iran-Contra, the average defendant costs, $2.5 million—$2.5 million.

This is just an example of some of the abuses. Also, when cost and resources are unlimited, there is no lead that is too expensive to follow.

In the *North* case, for example, it was like a CAT scan. Every word, and every document, was scrutinized. His wife was called to the grand jury. His sister was interrogated about how much it cost to feed the daughter's horse. The babysitter and the teenager who mowed the lawn were interrogated about how much they made. The minister was interrogated about how much the family contrib-

uted on Sundays. The veterinarian was interrogated about how the family dog died.

This is excessive. This is an excessive prosecution that ran amok.

Mr. GEKAS. I thank the gentleman.

Mr. BRYANT. The gentleman from Massachusetts.

Mr. FRANK. I would begin by noting that there are prosecutorial abuses. There is no pattern that I have seen from studies of all the Independent Counsel that suggest that they are greater with Independent Counsel or not.

The question, then, would have to be: Is there something on the statute that defeats that? I would say costs are a factor. We had Judge Wilkey who was appointed under the method that you prefer. He spent $2.4 million going to the Justice Department for no prosecutions in the course of less than a year. A million and a half dollars worth of FBI time went into Judge Wilkey's investigation, reading every check written by several hundred Members of Congress.

I think that example in the Federal Government was also excess and used up a lot of people. I could think of other things that FBI agents ought to do. These are the Justice Department's figures that the Wilkey investigation cost $2.3 million, including $1.5 million of FBI time. That was in a period of about 6 months.

As I said, that has resulted in no prosecutions. I think a lot of knowledge we didn't have before about what was involved in that situation, that is, the information about the bank, much of it preceded Judge Wilkey's investigation.

In fact, I would have to take issue with the suggestion on page 3 of Mr. Wilson's statement, that they have the full weight of the Federal Government held with them with the implicit expectations that the "guilty," will be "brought to justice."

I would read that to suggest that there was a kind of bias toward prosecution. That was, I think, a reasonable fear when the statute was first passed, as Mr. Dash pointed out, was passed by a Democratic Congress under a Democratic President in the late 1970's.

I think the record is overwhelmingly clear there has been no bias toward prosecution because many of the Independent Counsel have recommended no prosecution. I am aware of no record of serious criticism toward those Independent Counsel.

That, in the abstract, a reasonable fear, but the practical consequences is that Independent Counsel have served the function of exonerating people. Ray Donovan, I believe, was prosecuted by a State prosecutor. The Independent Counsel appointed for former Secretary of Labor Donovan exonerated him and found that there was no basis.

But take a comparison there. The regular prosecutorial system indicted Ray Donovan. He was acquitted. In the other case, he was exonerated.

We have put into our statute here a very unique requirement in American law, if you are, in fact, a target and are investigated and are not indicted, you get your lawyers' fees.

You don't, as we had established by Judge MacKinnon's court, get lawyers fees for writing articles about you in the paper. The lawyer has to do that on his or her or your own time, but insofar

as the lawyer is defending you. So, I don't think anyone could fairly say this has a bias.

The point, then, we get to, I think, is Mr. Wilson. As I say, you articulated your argument very well, but I come away, like Mr. Bryant, strengthened in the opposite conclusion.

What you say is, "The problem is that it takes prosecution away from the overall agenda of the executive branch." That's a direct quote. I think that's the nub of it. No, I do not want prosecutions of the executive branch to be solely in the discretion of people who are in tune with the overall agenda of the executive branch.

I have to say with regard to the example you gave in Panama, your problem was that the Panamanian station chief was apparently not free to decide on his or her own whether or not to support the coup, but had to ask Washington.

Do you advance that as a bad thing? Why is it bad for a station chief of the CIA to have to check with the Federal Government as to whether or not to support a coup against a head of state?

Mr. WILSON. Mr. Frank, you are in a much better position than I am to get to the bottom of that one. But I think that if you were to look into it, you would find that the people on the ground—it wasn't that they didn't have the capability, they didn't have the initiative, they didn't have the idea how to do it, but they were paralyzed.

Mr. FRANK. That's not what I asked. You said your objection was that they felt that they could not go forward in supporting a coup against the Government. Now, it was not 1 of the 200 most attractive governments then in power in the world. It was a government with which previous American administrations had done some business.

But I don't understand why it was wrong for the station chief of the CIA—not a very high ranking policy official—to have to check with Washington before deciding whether to support a coup against that government.

But that's your question. You said that the problem here was not that we couldn't do it, but that they felt they had to check with Washington. Is it bad that we have a statute that says, "Before you support a coup against the Government, check with Washington?"

Mr. WILSON. You mischaracterize what I am saying, Mr. Frank. Of course, any station chief in something that monumental is going to check with Washington. The question is: What happens in Washington when he checks?

What happened here was because of the enormous concern of the risks associated with implications back here under U.S. law, the process was paralyzed. Everybody came to a halt, Mr. Frank, because I submit to you nobody in the chain of command wanted to take the credit for——

Mr. FRANK. We have a limited amount of time. You've clarified the point. The problem is not the station chief. The problem is up above. Your suggestion originally was it was the station chief who was paralyzed, but I think the station chief, in your example, to the extent that he asked Washington whether to go ahead in supporting the coup, was doing the right thing. I would want him to do that in any case.

Now, you're saying that Washington was paralyzed—the Secretary of State and the President. Well, if the Secretary of State, the President, and the Secretary of Defense—who I presume are the people who decide on coups—were paralyzed because of this, shame on them. If they had so little confidence in this, then that is a fault of them and not of the system.

If they did not understand the difference here, then I don't think that's correctable, because your alternative is to say you don't want any prosecutions brought if they contradict the overall agenda of the executive branch in foreign policy.

Essentially that, I think, is what we had before that in the area of the execution of American foreign policy, the law is essentially irrelevant if the executive branch says that the law is less important.

Part of the problem has to do with your phrase, "the executive branch." Now, that is a viewpoint that is valid if you believe that the national security policy of this country ought to be wholly within the executive branch's control.

But I don't think it should be. In fact, it isn't constitutionally. There are statutes on the books. These are not Executive orders we're talking about. These are statutes passed by Congress. When Congress and the President have jointly promulgated a policy, then to say that only the executive branch is unilaterally allowed to forget about it, I think is a big mistake.

Mr. WILSON. Well, first of all, I'm not saying that. Let me clarify my use of my word "agenda." What I mean by the word "agenda" is the panoply of responsibilities that reside under the Constitution in the executive branch of government.

Those are the responsibilities of the President. In the case of the intelligence community, it goes from the President to the Director of Central Intelligence and then on down. There are considerations that have to be made, that these folks have the responsibility for.

Mr. FRANK. Do they include abrogating statutes?

Mr. WILSON. No. I'm not suggesting that.

Mr. FRANK. What if some of the course of that, some people in the executive branch decides to ignore statutes? Now, that does happen.

You're saying that if the executive branch finds a statute inconvenient, difficult to comply with, it basically can take a unilateral decision not to comply with the statute knowing that there will be no prosecution because it will control the prosecution? That's what you're telling me.

Mr. WILSON. Well, what I am saying is that, "Look, there are prosecutors who exercise discretion all the time." It's a question of how that discretion is exercised and what factors are taken into account, all of it living in the political realm where Congress is involved, where the press is involved, and where the political assessments of the American people are brought to bear.

Mr. FRANK. I have to disagree to a great extent. The role of the press is not nearly as strong there as it is in other areas. You talked about Watergate. Watergate is a domestic electoral situation.

But where you were originally talking about an event that happened overseas. It happened within a national security situation. It seems to me that is much less likely to be able to happen.

I am left with the sense that this is the difference between us, that you really do feel that national security policy, especially in an executive branch issue, and that the executive branch should be able to pick and choose it.

The final thing I would say is this. The justification for your argument, I think, is not to oppose Independent Counsel as the ultimate vindication, but it is the pardon power. That is what the President did in Iran-Contra. People are free to criticize him.

If the President feels that violation of a statute was justified in the national interest, then he has the pardon power. That is what the pardon power is for.

But what you're trying to do is move the pardon power down stream and instead of having you actually pardon someone, you do it by "prosecutorial discretion," and not prosecuting them. I think it much cleaner and healthier for the society if the pardon power carries the weight that it was meant to carry.

Mr. HIBEY. Mr. Chairman, may I respond in part to what Mr. Frank just said?

Mr. BRYANT. Yes, please, as quickly as you can.

Mr. HIBEY. I think there's a point also that has to be made here, sir, in going through the analysis which you just offered and that is this.

The Boland amendment which was in one of its incarnations, an absolute ban on military aid to the Contras, was never a criminal law. Now, I don't sit here to condone the violation of any law of the United States. But one has to make a distinction between those laws which are violated which contain penal provisions, and those which are not.

Mr. FRANK. That's a separate issue. I didn't hear your testimony. I was responding to Mr. Wilson's testimony. We shouldn't make any kind of distinction. That's a defense which people may or may not be able to make in a particular situation that this law had no penalty for violating.

In many cases, though, even if it's not a criminal law, lying about whether or not you did it is a crime and ought to be a crime. That's part of the problem. Part of what we're getting here is that, "Well, the way these things should be dealt with is not through criminal prosecutions, but through public debate."

But if there is no sanction against lying, we'll never get to the public debate. Much of these have to do with allegations that people lie. If people don't tell us the truth, what the hell are we going to debate about?

Mr. BRYANT. The gentleman's time has expired.

The gentleman from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Dash, I am a former aid to former Congressman Butler who served on the Judiciary Committee back at the time of the Watergate hearing. I know he respected your work greatly.

I noted you had proposed a couple of changes in the chairman's bill and in the statute. I'm a little concerned about those. There's

always been a sensitivity to the question of separation of powers among those who drafted this legislation originally.

Why do you think we should risk crossing that line by following your suggestion to provide judicial review of decisions not to prosecute?

Mr. DASH. That is a recommendation that I am now forwarding to this committee from the American Bar Association. It's not a personal recommendation, but I included it because I'm here not only personally but representing the American Bar.

It was their view that they would like to strengthen the Independent Counsel provisions. They were pioneers in getting this into the Congress. They would like to have the Attorney General, as he does have in the legislation, final decisionmaking as to whether or not he will apply for it or not and have it reviewed by the court.

I have concerns myself about that in terms of constitutionality and have suggested that to some of the representatives of the American bar. But it is their view—and they wish the committee to have it presented to them.

Mr. GOODLATTE. I have a similar problem with the other suggestion which is to allow the judges to on their own to expand the jurisdiction of the Independent Counsel by allowing them to again take it beyond the scope that's presented to them by the Attorney General.

Mr. DASH. Yes, I would like to see that being presented to the judge. I think maybe that is the recommendation, too, that the Independent Counsel can apply to the court to expand it. The Attorney General can be heard as to whether it should, with the decision of the court whether to expand it.

I don't have as much concern with that constitutionally as I do with the other. It would at least provide a forum for the Independent Counsel who begins to investigate to find a basis to expand his investigation, but have it as an application and have the Attorney General come in and explain why it should not be and then leave it up to the court to decide. I think that's is fairly consistent with the legislation as it is.

We haven't had very much.

Mr. GOODLATTE. You have also expressed a concern about the inability of counsel under the recommended legislation to determine how much he is going to pay to his assistant counsel.

Mr. DASH. Yes.

Mr. GOODLATTE. What kind of parameters would you put on that?

I certainly understand that he might want to have some experienced prosecutors on his staff that would expect to have, perhaps, more compensation than they would get under government schedules. By and large, prosecutors, whether they are State, local, or wherever they may come from, are under similar governmental pay scales.

Mr. DASH. As I said, I agree with that, they are. I think that is acceptable to most people who want to become prosecutors because, first of all, it is a career job, or it is a career building job, and they hope this will move them into higher paying positions.

The Independent Counsel, as I say, has to start running, needs experienced prosecutors, and the ones he will usually get, and I

agree with everything that has been said here at the table, that you do want to have experienced trial lawyers, and I would prefer experienced trial lawyers who had Federal prosecution experience, and most of those have already graduated out of the U.S. attorney's office and are at big law firms doing white-collar defense work. It is that kind of lawyer, I think, that they ought to be getting.

It seems to me that that is a negotiable thing that the Independent Counsel ought to make, but he oughtn't have that much of a limit.

Mr. GOODLATTE. About $500 an hour?

Mr. DASH. How much did you say?

Mr. GOODLATTE. About $500 an hour?

Mr. DASH. No. I think it ought to be less than that. I would think, and I haven't given that thought and I would like to give it thought, perhaps it ought to be pegged at a much higher Justice Department level than employees in the U.S. attorney's office.

Mr. GOODLATTE. But still with some limit on it, I would hope?

Mr. DASH. Yes, I would think so. I think it would be limited. I think a responsible Independent Counsel is not going to pay what the market will bear for a private defense counsel in white-collar crime.

Mr. GOODLATTE. Let me ask any of you about the provision that the gentleman from Massachusetts mentioned that allows for compensation for the object of the investigation to receive attorney's fees paid if he is not indicted. What about if he is indicted and not prosecuted?

Mr. DASH. May I speak to that, because being strongly in favor of the Independent Counsel——

Mr. GOODLATTE. But not convicted.

Mr. DASH. Being strongly in favor of Independent Counsel, Bill, and I think I said it the last time I appeared before this committee, but I am very much concerned with the financial burden that is put on a target of the Independent Counsel, and that clearly he should be compensated if he is investigated and not indicted. If he is indicted and not convicted, I also think he should be compensated.

Perhaps, I would add another, the mere fact that somebody happens to have a high government position doesn't necessarily mean he is independently wealthy. Anyone who looks at what it calls for to defend yourself in a major criminal case in America today knows it is in the hundreds of thousands, and maybe more, and most people, even people who have good jobs, are unable to really get the pay for that kind of defense, and it bankrupts them.

It seems to me, just as we do provide funds for people who can't afford counsel, in this particular case, when you are providing a kind of special prosecution, there ought to be, maybe, an additional fund, it will cost you more, but even for somebody who can show that he needs additional money beyond what he can expend.

England, by the way, has a comparable provision for people who are charged with a crime in England, they don't have to go to a public defender's office or a clinic just because they are abjectly poor. Someone may have a savings, somebody may be able to spend $10,000, say, on a defense lawyer, but the defense will cost $20,000. He can go to the bar and ask for a legal aid certificate,

and they will say, "How much expendable income do you have?" "I have $10,000. I need $20,000." They will give him a certificate for $10,000, and he now has $20,000 which he can go to a solicitor in England and get a lawyer of his choice. To me, that is a civilized system.

We can't afford it here in our ordinary criminal defense practice, but I would think, perhaps, this is being a real problem. It is reported by every target so far that these investigations have ruined them financially. I believe that is true. I believe, nevertheless, these investigations should go on. To the extent that Congress could provide a basis where somebody who is so charged is aided in his defense, because I do believe in our adversary system, and our system of justice in America calls for a strong defense as well as prosecution.

Mr. GOODLATTE. One question to Mr. Hibey, if I may, Mr. Chairman?

Mr. BRYANT. One more, we are running out of time.

Mr. GOODLATTE. You had indicated that you felt that we should have a permanent office of Independent Counsel. I am concerned that bureaucracies tend to find ways to perpetuate themselves, and that that would simply compound this problem. They are going to be constantly looking for ways to justify the personnel that they have on hand in order to keep their budgets up and the way every other bureaucracy operates, and I wonder if you have any observations about that?

Mr. HIBEY. Yes, I do, sir. It seems to me that it is not necessary to establish on a permanent basis an operating bureaucracy, but that a bureaucracy be put into effect once jurisdiction is claimed by the Independent Counsel who, on his own initiative, will assert, at one point in time or another, that he wishes to take on a case. The minute he does, then his bureaucracy and his administration, with all the appropriate accounting controls which are presently being considered in the pending legislation, would go into effect.

I am not thinking in terms of an Independent Counsel who has 20 or 30 people on staff. I am thinking of an Independent Counsel who, perhaps, by himself and with another is in place ready to act at an appropriate moment, that once that action to claim jurisdiction over a case or a subject matter is asserted, and is recognized and accepted and approved, would be about the business of building his staff immediately. That is why I would suggest drawing the staff from career prosecutors such as in the Public Integrity Section, pull them out, have them seconded to him or her, and he goes forward with his investigation. I don't see this as a bureaucracy that has to be in place, merely an office with an established officer with a given term ready to go.

Mr. BRYANT. The gentleman's time has expired.

The gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

I am very concerned, as I think everyone is, about our prosecutorial indiscretions, so I think what we should do is establish a new office called Special Prosecutors of Special Prosecutors, and have them oversee the operations of the special prosecutor.

Obviously, I am being facetious, but can anybody tell me why what we are discussing here today does not represent a major prob-

lem in the United States of America today, and that is the over lawyerization of our society?

In other words, we are creating yet another, or we are continuing yet another bureaucracy of lawyers who are going to oversee the operations of another set of lawyers, and I think maybe what we should have is a lawyer on every block. Actually, we need more than one. We need a prosecutor on every block in America, and then we need a defense attorney on every block, but I am very concerned about this prosecutorial indiscretion or misuse of power. So I think we need a prosecutor's prosecutor on the block, and maybe now we have three lawyers on the block, every block in America. Isn't this what is wrong with America today?

I mean we have a $4 trillion national debt, and here we are discussing lawyers checking up on lawyers, and how many layers do we need to create before—and I know that this is an open-ended question, and rather philosophical, but I think we have to backup and look at the big picture here. We have the Attorney General. Why don't we assume that she is a person of character and competence who is going to go about her job in a very effective way?

Why are we all of a sudden assuming that she has got to be some sort of the greatest crook that ever walked in that office, so we have to set up this special system so that we can go after her and her lack of prosecution of her office, and isn't that what we are talking about here, and aren't there a bunch of checks on that?

I mean, when she steps out of line, I think there are structures in place, probably the Republicans will point that out that she stepped out of line, there are a lot of people that are going to point it out to her that she stepped out of line in not pursuing some prosecution she should be pursuing. I mean, isn't that where we are?

Mr. DASH. No. Can I just briefly respond to that, we are not appointing lawyers to look over lawyers. We are appointing lawyers to substitute for other lawyers. Is something wrong with America, yes, something is wrong with America. We have had some unfortunate tragedies in America, Watergate was one, Iran-Contra was another. However one looks at those issues, obviously there were breaches in constitutional government.

You say, why can't we trust the Attorney General, again, I do want to report, that is not our form of government. Constitutional government, and Madison said it very well, "If men were angels, yes, we could trust them, but men are not angels and, therefore, we need checks and balances." This is just another legislative check on a system of government that has to ultimately get the confidence of the American people.

The confidence of the American people was terribly destroyed insofar as the operation of the Justice Department and the Attorney General, and an Attorney General went to prison. I am talking about Mitchell. So, no, we cannot—by the way, we don't want to, and no Attorney General ought to ask the American people to trust him. He ought to have the law applied to him, and he ought to do the law, but we are not a government that bases upon trust alone as a rule of law. Therefore, we don't pass our laws based on the fact that we have a nice or a good Attorney General. There always is the assumption of law that power will be abused, and we need to have checks in order to protect the American people.

Mr. INGLIS. Am I not correct though on the rest of it, that for nearly 200 years we lived without that?

In other words, there is a check on that, isn't it, it is called the political process. When that President comes back up for reelection, we boot him out.

Mr. DASH. That's right, but it doesn't always work, and in Watergate it didn't work well.

Mr. INGLIS. No, we booted him out. He got booted.

Mr. DASH. I know, but talk about expense and talk about exposure, that was unique. It is very rare that Congress can mobilize itself and can expose that kind of wrongdoing in the highest office in the world.

Mr. INGLIS. The guy who took his place was also booted out in 1976. So, in other words, then we got in 1976 a brandnew Attorney General who the political process had corrected, or had said, "Listen, we don't want this taint." Are we going to assume that that new Attorney General in 1976 is also a crook?

Mr. DASH. No. We are going to assume that he is honest, and effective, and in all criminal cases of the Federal Government, he is going to prosecute them. We are talking about very rare cases. If you take a look at how many Independent Counsel we have had, and even if you take this total amount spent, it is completely irrelevant compared to what we budgeted to the Justice Department in all of the prosecutions. No one is saying that the Attorney General should prosecute, or the Justice Department, but we are saying that we don't want the Attorney General to be charged with investigating the President of the United States, the Vice President or the Cabinet officials. Nobody is going to believe that.

Mr. INGLIS. But I am back to, we need a prosecutor's prosecutor on every block in America.

Mr. DASH. I don't think so.

Mr. HIBEY. What you have here is a very interesting historical perspective being offered to the committee and it has to be recognized as such. Mr. Dash's very eloquent plea for the renewal of this statute, and for certain elements which he comes to the table with for inclusion is a direct result of a very profound experience that all of us went through, but which he very directly experienced, namely the Watergate affair. Now, some almost 20 years later, you have three defense attorneys all of whom had very intense and very equally direct experiences with respect to the Iran-Contra affair.

I think that this committee has to understand that there is a difference, a substantive difference between what was at stake in the Watergate affair and what was at stake in the Iran-Contra affair when it is trying to make some judgments as to whether an Independent Counsel ought to be reestablished, and what the elements of that law should be. I think, Mr. Inglis, when you say there has to be a lawyer on every corner, I think that may be an overreaction to a situation.

On the other hand, if, by this statute, the committee and the Congress wish to recognize that our constitutional system of checks and balances is enforceable by the criminal law foremost, rather than by the political process, then I think some of your observations make sense. I think you are embarking on a very dangerous

situation, a situation which I think is embodied in the Iran-Contra affair where political differences between the Congress and the Presidency were attempted to be resolved first through hearings, which went, as far as I am concerned, into a complete disclosure of what had happened on material events, but then in seeking justice, rather than pursuing the impeachment process which is exclusive to the Congress, the Congress insisted that a special counsel be appointed, and immediately this whole thing was thrown into the criminal law, and the criminal judicial process. From that, I think you had a situation which, as far as we are concerned, was just totally a nightmare.

So I think that there are some very basic questions that you have to ask yourselves about how you want to see the system of checks and balances enforced in the United States. If it is through the criminal law, then you are going to have one of these statutes, but when you do so, you have to recognize that you could go into an experience which is terribly abusive, and even though there isn't anybody here from the Iran-Contra team, the prosecution team, I would submit that that is exhibit No. 1 for abuses which can take place under an Independent Counsel.

Mr. BRYANT. The gentleman's time has expired.

Thank you very much. We did not have to pay any of the attorney's fees today, but if we had had to, it would have been well worth it. Thank you very much for coming here.

Mr. GEKAS. I wish to extend my appreciation to the panel.

Mr. BRYANT. Our next panel is the Honorable George MacKinnon, a Senior Circuit Judge; George Terwilliger with McGuire, Woods, Battle & Boothe; and Terry Eastland of the Ethics and Public Policy Center.

We will invite you to come to the witness table.

Judge MacKinnon, thank you very much, and would you go ahead and proceed.

STATEMENT OF GEORGE E. MacKINNON, SENIOR CIRCUIT JUDGE, U.S. COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

Judge MACKINNON. Mr. Chairman and members of the committee, I would like to offer my statement for the record.

My appearance is in response to your request and is authorized by canon 4 of the Code of Judicial Conduct, which provides that judges may "consult with a legislative body on matters concerning the administration of justice."

I say that because when I testified before the committee before, an Assistant Attorney General of the United States criticized me for unethical conduct in so testifying.

I have served 7 years as the presiding judge of the special division and my last term expired on October 26 and Judge Sentelle is taking over now.

Since the enactment of the act, the special division has appointed 14 Independent Counsels, 10 during my service as presiding judge. We have had nine cases with respect to attorneys' fees that have been raised. We have five decisions that we have rendered with respect to the operation of the act.

At the present time there are three Independent Counsels serving: Iran-Contra; Samuel R. Pierce; and the *Mullins* case. They are serving under a special savings clause of the act.

Before addressing the contents of the bill, I would like to talk a little about the necessity for renewal, which seems to have been more or less the subject of the discussion heretofore. One of the most frequent statements of those who oppose the continuation of the Independent Counsel Act is the assertion that Watergate, and I quote, "established the integrity of the existing system."

However, Watergate required a special regulation and all these people that make that statement never get down to reading that regulation which provides, and I will just read a short part of it, "that the President of the United States will be consulted and he will consult with the majority Members of the House and Senate and the ranking and minority members of the Judiciary Committee of the House of Representatives ascertaining their consensus that whatever he does is in accord with his proposed action."

That is a complete surrender of executive power and it was not indicative of the fact that Watergate was prosecuted under existing means. Watergate thus is a denial that the existing system was adequate for the purpose. It wasn't.

The next thing they talk about is supervision. The lack of so-called, quote, "supervision of Independent Counsels by the Department of Justice," but of course the whole purpose of the act is to get away from supervision. I have had my experience with supervision. When I was U.S. attorney, I called the FBI the first year that I was in office, I said I want to investigate a labor case. The special agent in charge called me back and he said, "You don't know what you are doing here. You can't investigate a labor case without getting the approval of the Attorney General." "Well," I said, "get it." He got it. It resulted in the conviction of more people for labor racketeering in that one case than have been convicted in the entire Truman administration and resulted in the Teamsters Union being expelled from the AFL-CIO for 34 years. That is the kind of supervision they want to continue; so that the Department of Justice in these cases where there is a conflict, can control the matter.

They cite the *Deaver* case, which involved the Canadian Ambassador. He was interrogated voluntarily. The Canadian Government offered to cooperate with the investigation and consequently he was finally subpoenaed and they objected, and the court ultimately upheld the objection. They said it was not a complete waiver of governmental diplomatic immunity.

That was a court decision. That demonstrates that adequate supervisory power exists in the courts in Independent Counsel cases. All of this talk that you have been listening to, that these Independent Counsels are uncontrollable—there isn't a word of truth to it. All they have to do if they have any major objection is go before the judge that is handling the case and they will handle it as they did in the Canadian case.

Complaint is also made about the cost of the Iran-Contra investigation. Now of course this is a unique case. You are never going to have another case like that because you are never going to have a case where the President of the United States and the Attorney

General ask an Independent Counsel, naming only one person who is not a special person named in the act, that they should investigate him and every person connected with him—no names mentioned—for every violation of criminal law that they can find related to the requested subject. That is what the Attorney General asked for and that is what he got. So all your objections about Iran-Contra do not go to the prosecutor who was carrying out a tremendous job.

One thing: He has had 14 convictions. Two were reversed because of action by the Senate. All of this talk that you have heard here retrying these cases I have listened to when I was U.S. attorney: the person that you convicted was never guilty, there was always something wrong with the Government's case and so on, but that isn't the case with Iran-Contra and the convictions proved that particular fact.

Fourteen convictions with 2, as I say, overturned by court of appeals rulings on what was basically the action of the Senate, which was advised against by the Independent Counsel.

Another complaint is the time that these investigations take. Iran-Contra has been going on for 6 years. Let me tell you this: Teapot Dome went on for 6 years and they only had four cases.

It takes time to prosecute. Now you are talking about a 3-year limit here. When we get down to it, the HUD investigation is 3 years old the day before yesterday. It took a year and a half to get the first subpoena upheld. I suggest that you add a provision to the bill for the expedition by the court of these cases by the prosecutor and by the defense. That is a frequent provision in some other acts and I don't see any reason why it shouldn't be here.

Another item that causes a lot of time to be spent is the time spent by defense counsels, who are dragging up everything for years, trying to talk the Independent Counsel out of going ahead with the case. Of course, sometimes they yield to it so the time expended isn't all the result of the system. It's the result of—what is typical to most criminal cases anyway. Delay favors the defendants. They want as much delay as they can get and they get it. So I wouldn't be taken in by a lot of complaints about the amount of time.

On jurisdictional authority complaint is made that the special division in Iran-Contra exceeded the authority in granting excessive prosecutorial and investigative jurisdiction with respect to the application of the Attorney General. The contention was that the court was without authority, the special division was without authority, to authorize an investigation into North's alleged involvement with or support of the, quote, "Nicaraguan resistance."

Let me tell you though that the press release that the Attorney General issued the day he asked for Independent Counsel stated that he was requesting, quote, "an investigation in the matters relating to arms shipments to Iran and the transfer of funds from those shipments to the contras of Nicaragua."

Wouldn't the special divisions of the court look foolish if they hadn't included that in the particular jurisdictional authority? It was plain on the face that that was necessary.

Complaint is also made in the *Donovan* case that the special division exceeded its authority in delaying investigation. Well, if they

had read the application of the Attorney General, they would have found that the Attorney General in applying for a second Donovan investigation said that the Independent Counsel shall take no action which he determines after consultation with the division to the court may or is likely to result in publicity concerning the fact of his application, his jurisdiction or his investigation.

Donovan was being tried at that time by the State court and naturally they didn't want to be unfair to him and so the delay was something that was authorized; the act authorizes it as a matter of fact, and but the Independent Counsel did not delay his investigation. He worked undercover, didn't call a grand jury, right at the start and did preserve the requested secrecy.

With respect to the bill, on costs, some amendment with respect to who should oversee the cost of Independent Counsel investigating is certainly desirable, but it should not be the Independent Counsel. These people are not selected, because they are accountants. We have selected them because they have judgment with respect to bringing criminal cases and experience.

Imposing massive accounting duties on them would be outside their particular competency. I suggest that if you are going to make a change that you might consider that General Services Administration or the clerk of court of the District of Columbia Circuit. This is a big job if you have got a lot of cases and if you are going to cover 535 Members of Congress, you are going to have a lot of cases. Of course, if you do that, you may have to reconsider this whole bill anyway.

Mr. BRYANT. Judge, can we get you to press through to a conclusion? I am watching these three lights appearing fearful we are going to have to adjourn to vote in a moment.

Judge MACKINNON. What's that again?

Mr. BRYANT. I just wondered if I could get you to press to a conclusion.

Judge MACKINNON. Yes, I am.

My conclusion—I was going to give it to you first—is this. Whenever a high government official is subject to a criminal investigation by the administration of which he is a part, a potential institution conflict of interest always exists and always will exist.

Such conflict can only be remedied by the appointment of an Independent Counsel in a manner that does not present such institutional conflict of interest.

I will omit other comments that I probably ought to make.

Mr. BRYANT. We'll pursue those in questioning. Thank you very much.

Judge MACKINNON. Thank you.

[The prepared statement of the Mr. MacKinnon follows:]

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Administrative Law and Governmental Relations
Statement of
George E. MacKinnon
Senior Circuit Judge
U.S. Court of Appeals
District of Columbia Circuit

Mr. Chairman and Members of the Committee,

My appearance is in response to your request and is authorized by Canon 4 of the Code of Judicial Conduct which provides that judges may "consult with a legislative body . . . on matters concerning the administration of justice." Code of Conduct for Judges, Volume II, Chapter 1, Canon 4.

My seven year service as Presiding Judge of the Special Division of the U.S. Court of Appeals for the Appointment of Independent Counsels began on July 2, 1985 and terminated on October 26, 1992 the statutory expiration date. Judge Sentelle of the United States Court of Appeals for the District of Columbia Circuit is now the Presiding Judge.

Since the enactment of the Act the Special Division has appointed 14 independent counsels, 10 during my service as Presiding Judge, in the following investigations:

Prior Cases

Hamilton Jordan
Timothy Kraft
Raymond J. Donovan
Edwin Meese III
Raymond J. Donovan
Theodore Olson
Robert Perry (expansion of jurisdiction)
Michael K. Deaver
Oliver L. North, Jr.
Franklyn C. Nofziger
Edwin Meese III (expansion of jurisdiction)
Samuel R. Pierce, Jr.

Janet Mullins
Three confidential investigations

During my tenure the Special Division has decided nine cases with respect to attorneys' fees, as follows:

1. In re Oliver L. North (Gadd Fee Application). Without prejudice denied fees as application was premature, 842 F.2d 340 (D.C. Cir. 1988). Being reversed.

2. In re Raymond J. Donovan, 877 F.2d 982 (D.C. Cir. 1989). Reduced fees granted, no reimbursement for time which was either not reasonably necessary or sufficiently documented.

3. In re Sealed Case, 890 F.2d 481 (D.C. Cir. 1989). Fees awarded as agency restrictions preserving confidentiality prevented Attorney General from obtaining necessary facts to make a decision.

4. In re Olson, 892 F.2d 1073 (D.C. Cir. 1990). Unindicted subject of independent counsel investigation held entitled to reimbursement of reasonable fees and expenses paid to his attorney which would not have been incurred but for independent counsel's investigation.

5. In re Meese, 907 F.2d 1192 (D.C. Cir. 1990). Attorney General who was subject of investigation held entitled to reduced award of reasonable attorneys' fees and costs.

6. In re Nofziger, 925 F.2d 428 (D.C. Cir. 1991. Defendant who was subjected to an invalid indictment obviated the no-indictment requirement but did not satisfy the requirement that expenses would not have been incurred "but for the requirements of the Act."

7. In re Nofziger, 938 F.2d 1397 (D.C. Cir. 1991). Fees denied because there was no showing that the government official was subjected in the investigation to different standards of criminal law than are applied to

private citizens. The but for requirement held not satisfied.

8. In re Nofziger/Bragg, 956 F.2d 287 (D.C. Cir. 1992). No showing that fees would not have been incurred "but for" the Act.

9. In re Nofziger/Bragg, Div. No. 87-1 (D.C. Cir. July 14, 1992). Reconsideration denied.

In addition the court has ruled on five cases with respect to the operation of the Act, as follows:

1. In re Donovan, 7/3/86, 801 F.2d 409 (D.C. Cir. 1986). Motion by Washington Post and New York News for certain records denied. Motion for reconsideration denied. Div. No. 81-2, slip op. (D.C. Cir. August 22, 1986).

2. In re Olson, Div. No. 86-1, 4/2/87, 818 F.2d 34 (D.C. Cir. 1987). Matters may not be referred to independent counsel that the Attorney General has previously determined should not be pursued.

3. In re Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989). Witness held entitled to copy of his grand jury testimony.

4. In re Inslaw, 885 F.2d 880 (D.C. Cir. 1989). Private party lacked standing to compel investigation by Independent Counsel. The mere forwarding of material to the Department of Justice by the Independent Counsel did not impose duty on the Attorney General to investigate the need for an Independent Counsel.

5. In re Visser, 968 F.2d 1319 (D.C. Cir. 1992). Private citizen is without standing to apply to the Division for appointment of independent counsel and the Division is without jurisdiction to grant such application.

At the present time three independent counsels are serving. These investigations include Iran/Contra, Samuel R. Pierce, Jr. (Housing and Urban Development), and In re: Mullins. At the request of the

outgoing Attorney General received on December 10, 1992 independent counsel in the Mullins investigation was appointed and his jurisdiction defined by the Special Division on December 14, 1992. The Independent Counsel Act of 1987 ceased to be effective on December 15, 1992. The three pending investigations are continuing under the savings clause in the Act.

Comments on Act

Before addressing the contents of the Bill I submit some comments concerning the necessity for the renewal of the Act and some comments that have been directed to these issues.

Watergate

One of the most frequent statements by those who are opposed to the continuation of the Independent Counsel Act is the assertion that Watergate "established the integrity of the existing system . . . ." However, Watergate required a Special Regulation promulgated by the Acting Attorney General and the Department of Justice that established the Watergate Office of Prosecution. In that regulation the President effectively surrendered to Congress all his executive power to discharge the independent counsel except with the unanimous approval of the Judiciary Committees of Congress:

> In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen

> and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.

87 Fed. Reg. 30738-39 (attached).

Watergate is thus a denial that the existing system was adequate for the purpose.

Supervision

Complaint is also made about the lack of so-called "supervision" of independent counsels by the Department of Justice. Of course the principal purpose of the Ethics in Government Act is to deprive the Executive Branch of supervisory power over independent counsels. In support of their contention of inadequate supervision Justice asserts that the need for supervision was demonstrated in the Deaver case where independent counsel sought to subpoena the Canadian Ambassador to testify with respect to his employment of Deaver to secure political influence on a pending matter. Deaver had recently resigned as Deputy Chief of Staff of the White House and Assistant to the President and was forbidden by law for a short period to lobby his former agency. In the case independent counsel had previously obtained through the State Department a written statement from the Canadian government of its willingness to cooperate with this investigation by permitting four named Canadian officials, including Ambassador Gottlieb, to respond to appropriate questions put to them in writing through diplomatic channels. When a subpoena was sought through the court for the Ambassador to testify to that effect in court, the Canadian

government resisted and secured a decision by the United States District Court that the Canadian government's prior agreement to assist the independent counsel did not constitute a complete "waiver" of its diplomatic immunity. This is thus not an example of a need for supervision by the Department of Justice of independent counsels. (United States v. Deaver, Criminal No. 87-096, U.S.D.C., D.C. 622 1987). Rather, the case demonstrates that adequate supervisory power exists in the courts in independent counsel cases.

Cost of Investigation

Complaint is also made concerning the cost of the Iran/Contra investigation. This criticism fails to consider the tremendous magnitude of the investigation that the Attorney General and the President requested. The cost of criminal investigations and prosecutions cannot be forecast. In Iran/Contra 14 convictions were obtained -- with only two reversals, both attributable to circumstances that the independent counsel warned the Senate. No person cites the cost of Watergate, the cost of the Ill-Wind, or the Abscam, or Hoffa Grey Lord investigations and prosecutions. The short investigation of the Congressmen's accounts in the House Bank Scandal has an estimated cost of $2.3 million.

Time

Another complaint is directed at the time that the Iran/Contra case has taken. There is no complaint about the time of any of the other 13 independent counsel investigations. The time complaint in Iran/Contra as in other cases must be analyzed. Much delay in such

trials is caused by the actions of the defendants. They learn about the inquiry at an early stage contrary to the usual practice of Department of Justice investigations that are confidential, where defendants do not learn about their involvement until an indictment is returned. The putative defendants in independent counsel investigations spend unlimited time seeking to have independent counsel drop the inquiry that the Attorney General has requested. The independent counsel in Iran/Contra never requested any delay. It is also significant that he faced very substantial obstruction by the government. Just one instance; he was not able to obtain 2,000 CIA documents from the government until five years after the investigation started. Neither independent counsel nor the Act should be blamed for such delay caused by such obstruction.

HUD Investigation

The HUD investigation started promptly on March 1, 1990 and has been continuing for three years. A substantial subpoena was issued to one of the principal subjects on May 18, 1990, a month and a half after independent counsel was appointed. The subpoena was objected to. Even after the subject was ordered to comply she refused to do so. It was not until November 22, 1991, 18 months after the subpoena was served that the Court of Appeals finally upheld the District Court decision sustaining the subpoena. Thus the case was delayed over 18 months. Such delay adds materially to the cost of the proceeding.

While much of the delay is attributable to defense counsel I suggest that the Bill be amended to provide that independent

counsel cases be expedited by counsel and the courts.

Jurisdictional Authority

Complaint has also been made that the Special Division in Iran/Contra exceeded its authority in granting excessive prosecutorial and investigative jurisdiction with respect to the application of the Attorney General. The contention was that the court was without authority to authorize an investigation into North's alleged involvement with or support of the "Nicaraguan resistance."

The Special Division in authorizing appointment of independent counsel and defining his investigative and prosecutorial jurisdiction may include jurisdiction that is demonstrably related to the factual circumstances that gave rise to the Attorney General's request. Morrison v. Olson, 487 U.S. 654, 679 (1988). In this connection the Special Division, as it is authorized to do by the Federal Rules of Evidence, took judicial notice of the press release issued by the Attorney General which stated that he was requesting

> [an] investigation into matters relating to arms shipments to Iran and the transfer of funds from those shipments to the contras of Nicaragua.

The press release further stated that the Department of Justice was "proceeding to make such an investigation." The Special Division did not invent the relationship of the military shipments to Iran to the transfer of funds to the Contras of Nicaragua. It was plain on the face of the Attorney General's press release.

Delay

Complaint was also made that the court acted in excess of its authority in delaying an investigation. The reference is to the Donovan case and to the order by Presiding Judge Robb appointing independent counsel. However, those so complaining should have checked the application by the Attorney General for the appointment of independent counsel. The application submitted to the Special Division, because Donovan was on trial in state court, included a request that

> the independent counsel shall take no action which he determines after consultation with this division of the court, may or likely to result in publicity concerning the fact of his appointment, his jurisdiction or his investigation . . . .

It was thus perfectly proper for the Special Division (Presiding Judge Robb) to bring this request from the Attorney General to the attention of the Special Prosecutor, who incidentally did not delay his investigation and did preserve the necessary secrecy.

Teapot Dome -- Length of Investigation

Teapot Dome surfaced in 1922. Congress did not get around to directing the President to appoint counsel until February 8, 1924. Chapter 16, 68th Cong., 1st Sess. The Special Prosecutors, later Justice Roberts and former Senator Pomerene, were appointed and conducted four cases, two civil and two criminal, which were not finally disposed of until 1931, the date upon which Fall's conviction was upheld by the Supreme Court. Fall v. United States, 49 F.2d 506 (D.C. Cir.), cert. denied, 283 U.S. 867 (1931), June 1,

1931.

The Bill -- H.R. 811

Reauthorization of the Independent Counsel Law for an Additional Five Years

1. The Bill generally proposes to extend the Independent Counsel Act for an additional five years subject to substantial additions proposed later in the Bill that do not generally affect the principal provisions of the Independent Counsel Act except with respect to congressmen and costs.

Costs

Some amendment with respect to who should oversee the cost of independent counsel investigations is certainly desirable. But it should not be independent counsel. Independent counsel are selected to investigate and prosecute criminal cases against high government officials that in their judgment warrant prosecution. Lawyers that qualify for such appointments should not be required to perform massive accounting duties. In some respects the proposals in the Bill for supervising expenditures are an overreaction to the costs and the length of time involved in the Iran/Contra investigation. However, the resulting costs in Iran/Contra are attributable to the Attorney General and the President. The administration requested an unlimited investigation and prosecution into the potential violation of every federal criminal law by any person having anything to do with Oliver North -- and that is what it got. Complaints began to surface when convictions of high government officials resulted. Judge Walsh would be remiss in his duties if he did not carry out the

obligations he was appointed to fill.

None of the other investigations has been subject to such criticism. However, the investigation of former Secretary of Housing and Urban Development, Samuel R. Pierce, which is massive, involves much of HUD past activity and has taken one-and-a-half years just to have the courts sustain the first subpoena. This investigation will undoubtedly continue for some time and result in substantial costs. In this respect however Congress was adamant that such investigation be undertaken.

Administrative Support

The supervision of investigative expenditures should not rest upon the independent counsel. If the present system is to be changed, costs controls and administrative support might be undertaken by the General Services Administration or possibly by the Clerk of Court of the United States Court of Appeals for the District of Columbia Circuit. Some agency should assume this responsibility that is knowledgeable in such matters. Certainly not one that would criticize an independent counsel for negotiating a lower room rental to save the government money, or for using office space arranged for his staff by the General Services Administration.

Per Diem Expense

Travel expense. The Bill proposes for one year after independent counsel is appointed to limit payment of travel expense with respect to duties performed in the city in which the primary office of the independent counsel or person is located. To me this

change is questionable. Independent counsel selected from the city of Washington would not be concerned with an investigation being conducted in Washington but such charge would discriminate against the appointment of independent counsels of lawyers from outside the Washington area. Our experience has shown that it is very difficult in some cases to find qualified independent counsel from the city of Washington who do not have a potential conflict of interest. Those with the ability, experience and character are usually with large firms and their partners have clients that number in the thousands and their appointment would raise substantial conflict of interest questions. In one case we contacted forty-five qualified lawyers before we could get over the conflict of interest objection. When such conflicts appear on a belated basis as it did in the Olson investigation, great difficulties can be encountered.

During my tenure seven independent counsel have been appointed from the city of Washington and five from elsewhere, i.e., New York City, Oklahoma City, Philadelphia, Atlanta, New Orleans. It is submitted that the appointment should not be restricted or limited in the manner suggested.

Reappointment of Independent Counsel

The proposed amendment to § 596(b)(2) provides that if the Attorney General has not done so that not later than three years after the appointment of independent counsel and at the end of each succeeding three-year period the Special Division shall determine whether termination of the independent counsel is appropriate. I

suggest that this three-year limitation is unnecessary and undesirable. Any major criminal investigation, as with the HUD investigation and prosecutions, after three years may just be reaching the point when court delays have been overcome and the real prosecution begun. Changing counsel at that time could be very detrimental to any prosecution. Also, a new independent counsel taking over prosecutions at that stage would be under substantial handicaps and the inducement to replace independent counsel with an acting assistant, who might not measure up to the initial counsel, might be difficult to overcome. I believe independent counsel should serve for the duration.

Members of Congress

The Bill proposes that--

> When the Attorney General determines that it would be in the public interest the Attorney General may conduct a preliminary investigation in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether a member of Congress may have violated any federal criminal law other than a violation classified as a class B or C misdemeanor or an infraction.

H.R. 811, Page 9-10.

The purpose of this is to give the Attorney General discretion to investigate members of Congress and to request independent counsel investigations and prosecutions if its preliminary investigation so justifies. In my opinion, the proposal is unreasonable and undesirable. There is no institutional conflict of interest between an individual member of Congress and the executive branch of government and in my judgment including members

of Congress is not necessary. To add 535 additional potential subjects of independent counsel investigation would very substantially enlarge the coverage of the Act and lead to hundreds of unfounded complaints. Since time immemorial, members of Congress have been routinely prosecuted by the Department of Justice, Burton v. United States, 202 U.S. 344 (1906), and conflict of interests is never raised. Examples are legion. In my opinion, the preferable amendment would be to slightly enlarge the covered individuals and to repeal the discretionary coverage of those now covered by § 591(c). I believe the Act should be amended to cover officials with Oliver North's authority as mandatory subjects for independent counsel consideration.

Attorney's Fees

With respect to attorney's fees it would be helpful to include in the legislative history the statement included in the Senate Report on the Bill pending in 1992 that was suspended because of the threat of a filibuster. This statement is to the effect that Congress recognizes the court's opinion in In re Nofziger expresses the congressional intent with respect to the award of attorneys' fees to unindicted subjects of independent counsel investigation.

Withholding Related Material

Congress should also be cautioned against withholding substantial evidence of related cases when applications are made to the Attorney General for the appointment of independent counsel. Requests for the Attorney General to appoint independent counsel should not be treated as a continuation of a legislative hearing.

Substantial evidence of crime should be presented to the Attorney General before requesting the appointment of independent counsel.

Expansion of Jurisdiction

Section 593(c) providing for the expansion of jurisdiction of an appointed independent counsel should be amended to provide that before additional cases are presented to the independent counsel that the Attorney General's investigation determine that there is sufficient additional evidence of the commission of a criminal offense to justify further investigation.

Criticism of Independent Counsel

One author implies that Judge Walsh is trying, at his stage in life, to make a reputation. This is a preposterous accusation. Judge Walsh has been President of the American Bar Association, President of the Bar Association of the City of New York, Deputy Attorney General of the United States for four years in the Eisenhower Administration, United States District Judge for the Southern District of New York, legal counsel to Governor Dewey of New York for several years and has held other substantial positions.

Limitation of Travel to Primary Office

The one-year limitation on the payment of travel expenses to the primary office of the independent counsel is unreasonable and the exception allowed for "duties . . . in the public interest" is too ambiguous to constitute a workable standard. It would also, as a practical matter, effectively restrict the appointment of independent counsel to Washington lawyers. Limiting exceptions to

recertification "in the public interest" poses an unreasonably ambiguous standard.

Conclusion

Whenever a high government official is subject to a criminal investigation by the Administration of which he is a part, a potential institutional conflict of interest always exists. Such conflict can only be remedied by the appointment of an independent counsel in a manner that does not present such institutional conflict of interest.

Respectfully submitted,

George E. MacKinnon

Date: March 3, 1993

Title 28—Judicial Administration

CHAPTER I—DEPARTMENT OF JUSTICE

[Order 551-73]

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

Establishing the Office of Watergate Special Prosecution Force

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G–1 is added immediately after Subpart G, to read as follows:

Subpart G–1—Office of Watergate Special Prosecution Force

Sec.
0.37 General functions.
0.38 Special functions.

AUTHORITY: 28 U.S.C. 509, 510, and 5 U.S.C. 301.

Subpart G–1—Office of Watergate Special Prosecution Force

§ 0.37 General functions.

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecutor appointed by the Attorney General. The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix below which is incorporated and made a part hereof.

§ 0.38 Specific functions.

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities.

Dated: November 2, 1973.

ROBERT H. BORK,
Acting Attorney General.

APPENDIX—OUTER AND RESPONSIBILITIES OF THE SPECIAL PROSECUTOR

The Special Prosecutor. There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigation and prosecution of offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

Conducting proceedings before grand juries and any other investigations he deems necessary;

Reviewing all documentary evidence available from any source, as to which he shall have full access;

Determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;

Determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders;

Deciding whether or not to prosecute any individual, firm, corporation or group of individuals;

Initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after the assumption of duties), including any appeals;

Coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;

Dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their contentions are in accord with his proposed action.

STAFF AND RESOURCE SUPPORT

1. *Selection of Staff.* The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budget.* The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and responsibility.* The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

4. *Continued responsibilities of Assistant Attorney General, Criminal Division.* Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

5. *Applicable departmental policies.* Except as otherwise herein specified or as mutually agreed between the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be subject to the administrative regulations and policies of the Department of Justice.

6. *Public reports.* The Special Prosecutor may from time to time make public such announcements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

7. *Duration of assignment.* The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

[FR Doc.73-23693 Filed 11-6-73;8:45 am]

Mr. BRYANT. Mr. Eastland.

STATEMENT OF TERRY EASTLAND, RESIDENT FELLOW, ETHICS AND PUBLIC POLICY CENTER

Mr. EASTLAND. Thank you, Mr. Chairman and members of the committee. Good to see you, Mr. Frank. We usually meet on the television.

I would like to say in order not to be repetitive of what's been said earlier this morning, I'll just make several comments I think maybe apart from the text, which I have submitted to you—belatedly, I apologize for that, but there is a text.

Several points. It seems to me that if you are going to enact the Independent Counsel statute that you are basically right to propose the changes that I see in H.R. 811. I would suggest several other things.

On budgetary matters, I do not see here a proposal that perhaps there might be a budget submission, binding on the Independent Counsel, made to the relevant committees. That might be something you wish to think about in terms of cost controls, accountability.

It also seems to me on the salaries point which is dealt with here, the comparability point, I do think that is an important issue. One of the Independent Counsel, one of the assistants in Judge Walsh's office, was just out of law school and was being paid, I think, $72,000 according to the Independent Counsel's own office and I think that seems to me to be not comparable pay, if I may use that phrase, for someone with that limited experience and someone who apparently indicated his desire to be part of the going after of a President, if you will, in his memoir, so I think the comparability issue is important and I think modeling it after the U.S. attorney's office is a good way to think about it.

I am concerned as well about legal fees. I second Richard Hibey's concern here and the concerns of others, including Sam Dash. Ted Olson is not here this morning to testify, but as you know, the *Olson* case is interesting on this point. There was, I think, a sealed protective indictment of Ted Olson so that he could avoid being indicted, in which case he would not be eligible for attorney's fees, as the statute was written at that time. This was after the first reauthorization of the statute in 1983 and I think that language is still in the current statute. I don't think it was changed in 1987 but I do think that would be an area worthy of your addressing.

The issues dealing with the Administrative Office have already been dealt with and I do think they are a proper area of your concern. I would add to those that there do seem to be some issues arising from *Morrison* v. *Olson* that you might wish to look at. The opinion of the court in *Morrison* did deal with the special division of the court and interpreted some of the provisions dealing with the special division narrowly so as to avoid constitutional problems.

You might wish to make explicit some of the suggestions that may be found in the Rehnquist opinion as to the nature and duties of that office. I deal with this briefly in my submission but it might be something you wish to codify here.

There are, by the way, some other separation of powers concerns and I would say that the ABA suggestion, which has been raised

here earlier, seems to be problematic, in fact under *Morrison* v. *Olson* itself. I think if you had judicial review of the Attorney General's decision whether to even refer the case to a special division of the court I think that clearly would not stand up in the Supreme Court on review—if that is the proposal, if I have correctly characterized it.

I think the question of trying to impose time limits on the work of Independent Counsel is problematic. I don't know how easily it can be done. I mean these cases can be much too long. They could maybe be too short but I am not sure how adequately that can be written into the law but maybe it should be something you address.

I do want to focus on something not particularly discussed much at all to this point and that concerns the compliance with the Department of Justice policies. This goes to investigation or prosecution policies and I see here that it's been—the suggestion is to amend the current statute, inserting the language "shall except to the extent that to do so"—that is to say now where to comply—"would be inconsistent with the purposes of this chapter."

That raises for me the question of what are the purposes of this chapter? What specifically does that mean?

I think it is clear that in the *Iran-Contra* case that as has been pointed out here several times this morning, the individuals were not prosecuted for violations of the Boland amendment or the Export-Import Control Act, but rather largely in most cases for various ways in which these individuals lied or withheld information to Congress or in some cases the Independent Counsel himself or Government executive branch authorities.

I think that this is where you see a divergence, a sharp divergence between the traditional prosecutorial policy of the Justice Department and this Independent Counsel in particular—I am not saying all Independent Counsels to date.

But it could well be that one of the purposes of the statute as I understand it, one of the informal purposes may be to prosecute executive branch officials for lying to Congress. If that really becomes the purpose of the statute, and as far as I can tell, that really is what Iran-Contra is all about—Judge Walsh has said so himself—and he said he wished to establish a rule of law through his prosecutions and in the courts to establish that as a proposition.

I think if that is what it is about, I would suggest that perhaps Congress ought to look at the various statutes dealing with "lying" to Congress. This is apart from, by the way, Independent Counsel statute reauthorization or resurrection, if you will.

I think you may need to look at those statutes to consider whether they are properly drafted and written. You will see that the Justice Department historically—and there are authorities who have studied this question—has not brought the false statement statute charge in the context of unsworn testimony or if they have I think they have done it once historically and of course it was done quite frequently by Judge Walsh.

Now we might say that's a good thing and we want that done. I think it ought to be clarified perhaps by the Congress in new statutory language. Now again this is something separate from the Independent Counsel statute questions we are dealing with here, but it does seem to me quite important to have clear rules that can

then be used if we wish to do so in a prosecution of against executive officials.

By the way, I think as well there are questions about whether there are Members of Congress who lie or their staffers who lie. It's interesting that Peter Fleming's investigation in the Anita Hill-Clarence Thomas episode did conclude that someone lied, either a Senator or a staff member. We did not hear calls for someone to prosecute whoever did that but someone did lie, by the way, to the Congress.

That violation apparently was not taken as seriously as some others, but be that issue as it may, there is one other matter that I think ought to be mentioned here. I think that if you had a law case in which a President of the United States fired or asked the Attorney General—well, let me back up.

If you had a case in which an Attorney General ordered an Independent Counsel to comply with a particular prosecution policy of the Justice Department as currently found, is stated in the manual there or found in traditional practice, and the Independent Counsel said no, he would not comply with that statute, I think if a President then were to order his Attorney General under the statute to fire that particular individual, I think in that case if we read *Morrison* carefully, it seems to me that the court would probably side with the President in that kind of case.

So there may be cases or there may be issues here that you would like to think about in terms of this question of compliance with Justice Department policies.

Finally, I argued in my submission for the creation of an Office of Special Counsel, although I think that title has already been taken, we have a lot of lawyers in this town, perhaps an Office of Independent Counsel, whatever.

Just to reiterate that suggestion, I think Richard Hibey made it, the central problem, as I perceive it, with the Independent Counsel regime, as we have lived under it, is that it does create a separate justice system, and you do have a set of incentives, an arrangement with a set of incentives that are different from the usual system.

Some people call this good. I think that while we can look and see any number of abuses or any number of good things that might have occurred, ultimately the question is the kind of system you put in place. It seems to me here that an Office of Special Counsel or Independent Counsel that was located within the Justice Department that had historical continuity, that had someone in charge over time and could compare cases, understood the traditional prosecutorial practices, I think that kind of individual in such an office would be better integrated into the prosecutorial universe, and would benefit from it, and you might be able to have fewer abuses, especially the kind that have been discussed today.

Finally, I would say, I am against any resurrection of the statute. I think it is a bad idea, but I have displayed those arguments in my book, of which, by the way, I am happy to submit copies to this committee, if you would like it.

Mr. BRYANT. Thank you very much.

[The prepared statement of Mr. Eastland follows:]

Prepared Statement of Terry Eastland, Resident Fellow, Ethics and Public Policy Center

Mr. Chairman, members of the committee: I am pleased to be here today to discuss enactment of a new independent counsel statute. I worked in the Justice Department from 1983 to 1988 and observed the impact of the law upon that department and the executive generally. In 1989, I published a book on the statute. That book examined the origins and enactment of the law, its two reauthorizations, its enforcement, and its constitutionality and wisdom as a matter of public policy. The book is titled Ethics, Politics, and the Independent Counsel: Executive Power, Executive Vice 1789-1989, and I am happy to provide copies. In my most recent book, Energy in the Executive: The Case for the Strong Presidency, published by the Free Press this past fall, I devote one chapter entirely and parts of several others to issues involving the independent counsel law. My own views on the advisability of the statute are perhaps redundantly on the record.

If Congress desires to enact a new independent counsel statute, there are several obvious issues worth addressing. Under the old statute, for example, a special division of the U.S. Court of Appeals for the District of Columbia Circuit was assigned the job of appointing independent counsels. In Morrison v. Olson, the Supreme Court did not void this arrangement. But the Court, plainly concerned about the constitutional integrity of Article III judges, narrowly defined the division's statutory power to terminate a counsel. In drafting any new law, Congress might wish

explicitly to deny the special division the ability to use this power to remove a counsel while an investigation or prosecution is underway, and to authorize that court to use the termination power only to remove, in the language of Morrison, "an independent counsel who has served [his] purpose, but is unwilling to acknowledge the fact." Likewise, Congress might wish to change the statute, again in accordance with the majority's suggestions in Morrison, to deny the division the power to issue orders of a supervisory nature.

Changes like these, however worthy, would not overcome the key defect in the statute. And the key defect, I should hasten to add, is not that Title VI did not apply to members of Congress. There are those who claim that the situation regarding one of your colleagues, Congressman Ford, demonstrates the need for congressional coverage. The argument is that an independent counsel would not be influenced by a congressional delegation; therefore, as the instance involving the Clinton Justice Department allegedly shows the opposite, we need one an independent counsel to investigate members of Congress as well as the executive. I would argue to the contrary, however, that what the Ford story shows, among other things, is that the Justice Department is a multi-layered institution quite capable of doing the right thing. The main Justice decision to countermand the U.S. Attorney's effort to prosecute Mr. Ford in a city other than Memphis was met with the resignation of the U.S. Attorney. As the judge was unwilling to move the trial, it commenced as scheduled.

The principal problem with the old independent counsel statute concerns the character of the justice system it creates. Under the old law, each counsel had only one subject matter to investigate but unlimited resources to do what he or she wished. And each counsel got to start from scratch, ordering supplies and hiring aides for an office that did not exist before appointment. A counsel did not have to consider the merits of other, similar cases or worry about normal budgetary constraints in deciding how far to press the case at hand; a counsel was not surrounded by peers handling similar cases or supervisors counseling him in his labor; and a counsel did not have to follow Justice Department policies or take account of the administrative, national security, diplomatic, and other considerations that often shape a federal criminal investigation.

While some of the changes in H.R. 811, as I read it, seem aimed at making an independent counsel more accountable, the legislation in my judgment would not be reform enough. Strong incentives would still exist for independent counsels appointed under this legislation to go their own way, a way that could distort justice and weaken our political system.

As I say, I prefer not to have an independent counsel law, but if we are to have one, I would recommend a quite different arrangement. The purpose of such an arrangement would be to better integrate independent counsels into the traditional prosecutorial universe with its more fully developed sense of fairness, perspective, and judgment. The arrangement I have in mind would be

an Office of Special Counsel -- unless that title has already been chosen. It would be assigned the duty of investigating and prosecuting high-ranking government officials. These could include not only so-called "covered" persons from the executive branch, but also members of Congress. The head of the office would be appointed by the President, subject to Senate confirmation. The individual would be subject to removal as the President wished. This would introduce the important element of accountability now lacking and have a beneficial influence upon the attitude of the counsel, who would not think himself superior to the President or our system of laws and able to craft his own prosecution policies or to disregard diplomatic or other executive branch concerns. At the same time it is doubtful that the president's unfettered ability to fire an independent counsel would threaten the integrity of his work. The political costs of doing so, without clearly justifiable cause, would remain the ultimate insurance policy.

Organizationally, the office would be located within the Justice Department but could be physically housed elsewhere, as a symbol of its independence. The office would have a small staff, and, as part of the Department, would be obligated to follow agency policies. In this respect, by the way, the provision in H.R. 811 that amends the old 594(f), which is the provision concerning compliance with policies of the department, will not constrain an independent counsel hellbent on departing from DOJ policies, without very good cause. Because such an office would be continuous, institutional memory would develop; a larger

prosecutorial universe would serve to check the occupational hazards of single-minded prosecutors -- those of too narrow focus, of diminished perspective, of preoccupation with one allegation or suspect to the exclusion of all else. The office would handle allegations from the moment they were made. The Attorney General, using the Criminal Division, would not screen the allegations, as the previous statute provided, nor, obviously, would he refer them to a court for appointment of an independent counsel; the roles played by the Attorney General and the Special Division under the Special Division would be eliminated. The Office of Special Counsel would make the decision whether to prosecute or not, and the first public notice of any action taken would be on the day an indictment was returned -- as in any other government prosecution. Any report on an investigation would be patterned after the straightforward one in Watergate.

Such an office would be independent in all the senses that truly matter, but because of its integration into a larger prosecutorial universe, it would not be as likely to behave in the unreasonable and unfair fashion of some recent independent counsels. Neither would investigations tend to consume as much time and expense as they have in the past.

The idea of such an office is not new. Then Senator Howard Baker suggested it first, in 1974. The Ford administration proposed it in 1976. That legislation actually passed the Senate by a vote of 91 to 5. A few years ago, Andrew Frey and Kenneth Geller, former career officials at the Justice Department,

advocated a very similar idea in the pages of the Washington Post. The concept has downsides, chief among them that the office might try to generate business in order to be a bureaucratic success. Still, such an office would be a vast improvement over the ad hoc creation of independent counsels, the system established by the old statute.

The greatest improvement of all would be for this body to do nothing, which is to say, to let the law that died on December 15, 1992, stay in its grave.

A Washington without the independent counsel law would be one in which the post-Watergate political culture, sensitized as it is to charges of government malfeasance, would work in such a way as to refocus constitutional responsibility on the President and the Congress. Presidents would be pressed by the media and Congress to confront allegations, and Congress would be pressed by the media to investigate and even commence impeachment proceedings. Both branches would be held accountable by the people for their actions -- or lack thereof.

The result would be a gain in political perspective and constitutional purpose. Investigation and prosecution of executive malfeasance would cease to have the disproportionate influence upon our politics it has had in recent years. There would be incentives to practice ordinary politics without fear that political disputes might result in a criminal trial. The political culture would be freed of the temptation created by the old statute to frame allegations of malfeasance in exclusively criminal terms. The

President no longer would have an excuse to postpone, if not forgo altogether, assessments of the behavior in question in broader terms of ethics and political damage. Criminality would not be the measure of appropriate conduct or fitness for office, and resignation by those who have engaged in dubious conduct would become a more viable option. As it happened, the old law pressured individuals to stay in office while an investigation proceeded, on the reasoning that to leave was to admit guilt.

In a world without an independent counsel law, Presidents or Attorneys General could exercise their discretionary authority in cases of conflict of interest and name Watergate-type prosecutors. Fewer such prosecutors would probably be appointed than were named pursuant to the independent counsel statute. This is hardly an undesirable consequence. The decision to name an outside counsel ought to reflect a more balanced judgment than often occurred under the old statute, which weighted the legal and political scales in favor of a referral. Still, however many or few "outside" investigations might occur without the law, it is very probable that the President would name, or have named, a special prosecutor in the most serious cases.

One argument against returning to the pre-Watergate world is the thought of a special prosecutor firing, as in that of Archibald Cox. The answer to this is that there is every reason to think that a President will not repeat the Nixon mistake of unjustifiably firing a special prosecutor; the prospect of embarrassment and obloquy, and ultimately impeachment, should work to prevent that

occurrence. Yet even if a special prosecutor is fired, history shows that a replacement is soon thereafter named. That was the case on each of the three occasions on which special prosecutors were fired -- under Presidents Grant and Truman, as well as Nixon. Finally, I should add that there is nothing wrong with going through another Watergate wringer. The framers of the Constitution made it hard to dislodge a President, and it should be hard. The process should force deliberation, and it should be a public deliberation.

Thank you.

Mr. BRYANT. Mr. Terwilliger.

STATEMENT OF GEORGE J. TERWILLIGER III, ESQ., McGUIRE, WOODS, BATTLE & BOOTHE

Mr. TERWILLIGER. Thank you, Mr. Chairman, and thank you for this opportunity to present my views on H.R. 811. I will endeavor to be very brief in interests of time here.

The question of reauthorizing the Independent Counsel Act, I think, presents important issues of public policy concerning the administration of justice. I think the proposed statute would affect three aspects of the administration of justice, that were also touched upon by the prior statute, that deserve careful consideration.

The first is the impact on the basic separation of power structure of our Government, which we have heard something about this morning.

Two is the impact on the normal functions of the Department of Justice, and public perceptions of those.

Three is the impact on persons whose conduct is subject to the jurisdiction of an Independent Counsel appointed under the act.

Let me state at the outset that I recognize that H.R. 811 attempts to legislate some much needed reform in the operations of Independent Counsels under the prior statute, and I applaud the committee for recognizing the need for that reform. However, I cannot conclude that the reforms proposed go far enough to correct the flaws that experience with the statute has identified, as well as flaws inherent in its basic structure.

In my view, the provision for a prosecutorial entity that is largely independent of the executive branch creates an official who is basically accountable to no one for the exercise of awesome prosecutorial powers.

I would note parenthetically that if one gives broad consideration to everything that Professor Dash said this morning, all of the concerns that he has expressed, and I appreciate his passion for having positive values in the administration of justice, but everything that he expressed about inherent conflicts of interest and so forth would apply with equal weight, in my view, to an Independent Counsel who was a prosecutor basically accountable to no one.

A special prosecutor who is not accountable to any executive branch authority is inconsistent with the basic theme of separation of powers in our Government, and substituting judicial or congressional oversight for executive accountability only compounds that problem.

Second, to be effective in its responsibility to administer justice, the Department of Justice must be perceived as having a high degree of credibility and integrity. The statute, which presumes that the Department lacks those qualities in certain circumstances, or as to certain cases, as the Independent Counsel statute does, undermines the Department's general effectiveness in other circumstances.

Third, the statute creates real dangers to the rights of those subject to an Independent Counsel's investigation or prosecution. A prosecutor, and I have been a prosecutor, or was a prosecutor for 14 years, a prosecutor who sets out to pursue singular targets lacks

the perspective of prosecutorial entities that can examine alleged wrongdoing against a broad tableau of criminal mischief.

However, I recognize that certain circumstances may make resort to a prosecutor with some degree of independence appropriate, and I think there is a viable alternative to appointment of a statutory Independent Counsel. I think it is very interesting to hear this morning that I will be the third witness that the committee has heard from that recommends some variation on a theme of what I am about to recommend. And I would urge, despite the political momentum that may stand behind creation or reauthorization of this statute, that what I and these other witnesses have identified be considered as an alternative. The alternative is some discretionary appointment of an independent special prosecutor by the Attorney General under current law. Under the prior statute, and under a current regulation, this prosecutor would be removable only for good cause, and could contest the merits of that removal in court.

I believe that the triggering mechanisms afforded Congress in the prior statute could be retained, but ultimate accountability for the prosecution function would remain with the executive branch.

I also would like to parenthetically add a comment about what Tom Wilson said this morning, and that is the need to consider national security and foreign policy issues in exercising prosecutorial discretion in certain cases. That is an entirely legitimate factor to consider in the exercise of prosecutorial discretion. It is one that is a product of the unitary executive system that we have where we do not have prosecutors that function solely to secure the prosecution function, but function as part of the overall system to see to it that the laws are faithfully executed.

I can tell you from my own experience that some of the most difficult matters that I faced, particularly while I was Deputy Attorney General, dealt with weighing national security and foreign policy concerns in regard to the decision to prosecute an individual case.

Mr. FRANK [presiding]. Thank you.

[The prepared statement of Mr. Terwilliger follows:]

PREPARED STATEMENT OF GEORGE J. TERWILLIGER III, ESQ., MCGUIRE, WOODS, BATTLE & BOOTHE

Mr. Chairman and members of the Committee:

I am pleased to have this opportunity to present my views on H.R. 811, the Independent Counsel Authorization Act of 1933.

The question of reauthorizing the Independent Counsel Act presents important issues of public policy concerning the administration of justice. The proposed Independent Counsel statute would affect three aspects of the administration of justice that I believe deserve careful consideration: one, the impact on the basic separation of powers structure of our government; two, the impact on the normal functions of the Department of Justice, and public perceptions of the same; three, the impact on persons whose conduct is subject to the jurisdiction of an Independent Counsel appointed under the Act.

I believe the impact of the prior Act and the proposed legislation in each of these aspects is adverse to the administration of justice in the United States. This counsels, therefore, against reauthorization of the Act. I will briefly discuss the basis for my conclusions as to each aspect and then present a modest proposal for an alternative means to accomplish the objectives of the Independent Counsel statute.

Let me state at the outset that I recognize that H.R. 811 attempts to legislate some much needed reform of the operations of Independent Counsels under the prior statute. I applaud the Committee for recognizing the need for such reform. However, I cannot conclude that the reforms proposed go far enough to correct the flaws that experience with the statute has identified and flaws inherent in its basic structure. In addressing both the adverse impact of the proposed legislation and the rationale for the alternative I present, I will address these deficiencies in the reform effort.

Adverse Impact on the Administration of Justice

Separation of Powers

I recognize that the Supreme Court upheld the constitutionality of the prior Independent Counsel statute in Morrison v. Olson. Nonetheless, from a public policy analysis, the wise course is to favor preservation of the delicate balance of powers in our governmental structure. Legislation, generally, should avoid creating governmental structure or operations which confuse Constitutional responsibilities basic to the separation of powers.

As we all recognize, under our Constitution it is the Executive's duty to see to it that the laws are faithfully executed. No Executive function is more fundamental than that concerning the investigation and prosecution of criminal wrongdoing. The Executive Branch is regularly criticized for what it chooses to investigate and prosecute as well as for what it does not investigate and/or prosecute. Our system, however, recognizes that the decision to commence investigation and to prosecute wrongdoing is uniquely an Executive function. Courts have consistently declined to assert any power to require the Executive to commence criminal proceedings and have relatively limited power to terminate the same. Congress, Constitutionally, has no role in such proceedings apart from its obviously important function of determining what conduct shall be proscribed by the law and conducting oversight of Executive functions. Congress is, of course, free to voice its disagreement with Executive decisionmaking, including the exercise of prosecutorial discretion.

The check on the exercise of investigative and prosecutorial discretion is, in its essence, a political one. The President and the Attorney General are held accountable by the people for whether or not the task of investigation and prosecution is being faithfully performed.

Under the prior statute, however, an investigator/prosecutor was created who was, in both legal and practical terms, accountable to no one. H.R. 811 includes several provisions that attempt to address this glaring and oft-cited flaw in the prior statute. This flaw is most directly addressed in the provisions of the bill providing for the Independent Counsel to submit an annual "status report" to Congress and for consideration of reappointment of an Independent Counsel after three years in office. More indirectly, the legislation purports to subject an Independent Counsel to the ethical oversight of the Attorney General and the Office of Government Ethics.

These provisions do not, however, resolve the issue of an Independent Counsel's lack of accountability. Moreover, the provision for an annual status report to Congress is both theoretically and practically flawed. In our system it is simply not the business of Congress to review the substance of ongoing criminal investigations. I recognize that this provision is admirably motivated as a device to make Independent Counsels more accountable. However, an Independent Counsel should be no more, or less, accountable to Congress than any other federal prosecutor. This provision offends separation of powers concerns. On a practical level, it is simply ill-advised to provide for Congressional review of on-going criminal investigations. The dangers of unwarranted political influence on the investigatory process presented by this provision are real. To avoid some of this danger the proposed legislation provides for an Independent Counsel to omit confidential information from such reports. Withholding of such data, while certainly proper, is counter-intuitive to the enhancement of Independent Counsel accountability. This underscores the difficulty in attempting to hold Independent Counsels accountable to Congress.

H.R. 811 also seeks to address issues of fiscal accountability for Independent Counsels. The goal of increased fiscal accountability and specific provisions to control costs are laudable. The necessity for such provisions, however, further underscores the inherent difficulties created by an office that is truly independent of normal government operations. To the extent that past practices have dictated the necessity of these fiscal controls, one wonders what other mischief is possible in matters far less subject to quantifiable analysis.

The fundamental flaw present in the prior statute, a pronounced lack of accountability, remains in the legislation. Giving ethical enforcement power to the Attorney General accomplishes little without giving the Attorney General express authority to conduct investigations of the ethical conduct of an Independent Counsel. The legislation also does not give the Attorney General any enforcement authority regarding the requirement that an Independent Counsel adhere to Justice Department policies. Obviously, provisions that would put real oversight authority in the Attorney General would be considered by many a threat to the independence of these specially appointed prosecutors. Thus, the fundamental concept and structure of the law thwarts any real attempt to render Independent Counsels accountable. This presents a substantial weakness in the bill. These provisions are, simply, an inadequate check on the exercise of prosecutorial power.

Impact of the Department of Justice

I spent more than fourteen years as a federal prosecutor, beginning my career as a law clerk, then a line prosecutor, a United States Attorney and finished my tenure as Deputy Attorney General. I do or should know the Department of Justice as an institution as well or better than anyone who has had the privilege of holding its highest offices. Without

equivocation. I can testify that the existence of an Independent Counsel statute is harmful to the Justice Department's mission in securing the administration of justice. Such a statute represents a presumption that the Department is incapable of policing wrongdoing by high executive branch officials. I state this without rancor or malice toward those who are proponents of such legislation. Rather, I think it must be said because it is true and because the perception of this presumption underlying the statute undermines the general effectiveness of the Department.

The effectiveness of the Justice Department's day to day work is dependent upon its credibility and integrity. Because the process of exercising prosecutorial discretion is not one, for good reason, carried on in the open, some faith must be accorded to the integrity of the decisionmakers. If there is a widespread belief that the Department's integrity is questionable, there will be little faith in and comfort with its decisionmaking. An Independent Counsel statute that presumes the Department lacks the credibility to decide some of its most sensitive potential cases undermines the Department's general credibility and is adverse to its effectiveness. This standing presumption that the Department is incapable in one set of circumstances lends credence to unfounded allegations that it is incapable in others.

I do not mean to suggest that the Department is flawless in its operations or that its prosecutors do not make mistakes in judgment. Nor do I suggest that there are not occasions where prosecutors are overzealous or otherwise testing the bounds of ethical propriety. All appropriate means, including vigorous challenges in litigation, should be employed to test the Department's prosecutions. A statute which presumes an incapability to perform vital and highly visible functions, however, is not conducive to having a Justice Department that is held to be of the highest calibre and integrity.

The mandatory nature of certain "triggering" mechanisms [see 28 U.S.C. § 592(c)] in the prior statute also create artificial and unnecessary burdens on prosecutorial decisionmaking in the Department. I am aware of circumstances where no reasonable prosecutor would conclude that initiation of prosecution is appropriate, but which nonetheless must be referred for appointment of an Independent Counsel. This creates unnecessary work which further burdens the criminal justice system and is patently unfair to the subjects of investigation.

Adverse Impact on Targets of Investigation

The absence of many of the normal institutional checks and balances on the prosecutorial function in an Independent Counsel's office is a threat to the rights of those subject to its investigations. In 1940, future Supreme Court Justice Robert Jackson recognized that the prosecutor with a singular target represented the greatest potential abuse of prosecutorial power [see Morrison v. Olson, 487 U.S. at 728 (Scalia, J., dissenting]. As Justice Jackson recognized, the administration of justice is best served by examination of individual misconduct against a tableau of all cases a prosecutor sees and all those assimilated into the institutional knowledge of a prosecutorial entity. Even the most conscientious Independent Counsel lacks the benefit of such perspectives.

The proposed legislation and the prior statute attempt to graft such institutional knowledge and perspective on to Independent Counsel by requiring adherence to the Justice Department's "written or other established policies" [28 U.S.C. § 594(f)]. How, one might ask, is an Independent Counsel to know of "other established policies"? This provision, simply is inadequate to the task of rendering an Independent Counsel's operations consistent with the Department's traditions of practice, policy and procedure, much of which is institutionally

known, but not of such a nature that it can be reduced to formalistic writing. This inadequacy is only heightened by the lack of any measure for enforcement of the "adherence" provision, even at the instigation of those targets of investigation perhaps most directly effected by a failure to adhere.

Moreover, a putative defendant faced with a looming indictment by an independent counsel has no recourse to any higher authority to challenge the exercise of prosecutorial discretion. Likewise, an indicted defendant seeking a negotiated disposition cannot even argue to higher authority that the prosecutor's offer is inconsistent with dispositions permitted in like circumstances in other cases.

Perhaps most importantly, a putative defendant has no avenue for discussion with senior policymakers, removed from the heat of battle, concerning the dangers of expanding the realm of prosecution to cover new areas of alleged wrongdoing. If there is a danger in criminalizing policy disputes within the government, the degree of concern should rise exponentially where a prosecutor is appointed to singularly and independently pursue criminal charges in just such circumstances.

Achieving the Objective of an Independent Counsel Statute
Without the Deficiencies of Prior and Proposed Legislation

It is evident that many have recognized the dangers and deficiencies of the prior Independent Counsel statute. While the proposed legislation contains modest reform, it cannot achieve real reform of the deficiencies because those are inherent in the construction of a prosecutorial entity largely independent of the authority of the Executive.

At the risk of alienating those absolutely committed to the necessity of an Independent Counsel statute, closely resembling the current model, as well as those unalterably opposed to recreation of the authority for any such office, I respectfully submit another concept for consideration.

I confess at the outset that if forced to choose, I would oppose reauthorization of the statute, largely for the reasons stated in the foregoing. However, my own experience in the Department of Justice leads me to conclude that there are circumstances where concern for the administration of justice, as well as very real practical and political considerations, suggest that resort to a prosecutor with a degree of autonomy is, unfortunately, appropriate. Both the public interest in the perception of the fair administration of justice and the interest of an accused in a credible outcome may render an independent counsel type function necessary in certain limited circumstances. These circumstances are not, however, limited to alleged wrongdoing by high Executive Branch officials.

The prior process of appointment of a statutory Independent Counsel is premised on the belief that institutionally the Justice Department is not capable of investigating the alleged wrongdoing of these high Executive Branch officials. The fear is that political pressures could be brought to bear that would taint the Department's decisionmaking in the prosecutorial process. Thus, the thinking goes, there is a need for a prosecutor free of such pressures who is to be "independent" of the Executive that can create such pressure. This same rationale, however, can be applied in some circumstances where the alleged wrongdoer is a member of Congress. Conversely, both classes of individuals can present circumstances where resort to an "independent prosecutor" is unnecessary.

This notion of "independence", though, is the fundamental flaw in the system created by the statute. It removes the accountability for decisionmaking from appointed and elected Executive officials and reposes it, instead, in an inferior official accountable, in reality, only to his or her conscience and concern for personal reputation. If there is a willingness to place that much responsibility in one person, does not a system that accomplishes the same ends, yet leaves the ultimate accountability with Executive officials make even more sense? A system could be created that would give the Attorney General discretion in all circumstances to decide whether to appoint an Independent Counsel and that would provide for judicial review of any Attorney General decision to terminate the appointment.

Currently, the Attorney General has the authority to appoint an "Independent Counsel" under the general appointments authority of Title 28, United States Code. A detailed process for doing so and authorizations for the conduct of the office is also extant [28 C.F.R. § 600, *et seq.*]. This "independent counsel" or special prosecutor has many of the same assurances of independence as do those Independent Counsels appointed by the Special Division of the Court under the statute, including removal only by the personal action of the Attorney General and only for good cause [28 C.F.R. § 600.3]. This regime could be modified so that an order appointing such special prosecutors can prescribe any degree of independence necessary in the circumstances of a particular matter, including relatively complete independence. However, this "special prosecutor" should remain a subordinate officer of the Attorney General and, thus, the ultimate accountability for his or her functioning would remain where it should - with the Executive.

If the personal recusal of an Attorney General is required on either traditional recusal analysis or on a basis similar to that prescribed in 28 U.S.C. § 591(e), the Attorney General can be recused from the responsibility to appoint a special prosecutor in favor of either a subordinate Department official or, in extreme circumstances, a special outside counsel engaged to perform that function.

The advantages to utilizing a process of Attorney General appointment of a special prosecutor rather than a statutory independent counsel are many. In addition to maintaining traditional lines of Constitutional responsibility and accountability, the special prosecutor can utilize the institutional ethos of the Justice Department as embodied in its career professionals. The special prosecutor would have the entire Department of Justice available as a resource, including its considerable investigative apparatus. To whatever extent independence is required, walls of non-disclosure can be created within the Department to insure the same. The special prosecutor would also be subject to the same level of ethical scrutiny and fiscal accountability as a regular Department prosecutor.

The current regulations for appointment of an "independent counsel" by the Attorney General do not address the "triggering" mechanisms of the prior statute, particularly the authority of the Judiciary Committees to initiate preliminary proceedings under the statute [28 U.S.C. § 592(g)]. Under my proposal, these mechanisms could be essentially retained, including the mandatory requirement that the Attorney General report within 30 days whether a preliminary inquiry has begun or will commence. The difference would be that an ultimate decision that independent prosecutorial authority is required would result in an order of

appointment of a special prosecutor by the Attorney General or his designee, rather than an application to the Court for a statutory "Independent Counsel".

This proposal, so far, can be said to still beg the question of the ultimate independence of the special prosecutor from improper influence. To insure public confidence in the relative independence of the special prosecutor one provision of the current regulation could be enacted into law, with some modifications. Under the regulation, an Attorney General appointed Independent Counsel removed for good cause by the Attorney General may obtain judicial review of the removal in a civil action before the "special division" of the court [see 28 U.S.C. § 49]. Enacting this provision into law would provide an appropriate safety value to guard the independence of a special prosecutor. A new statute embodying this provision should be modified in two respects. First, removal should be permitted by either the Attorney General or by a designee if the Attorney General is recused or has otherwise designated another to perform this function (the President, of course, retains the authority to dismiss any Executive Branch official). Second, good cause for dismissal should expressly include that the Attorney General or a designee has determined that a prosecution proposed by the special prosecutor should not go forward, unless that decision has been specifically delegated to the "special prosecutor" by the terms of his or her order of appointment.

This proposal would maintain accountability for the responsibility to execute the law where it belongs, in the Executive Branch. It would provide for a suitable degree of independence and eliminate many, but not all, of the most troubling aspects and implications of the prior statute.

I present this as a concept and an alternative, recognizing that effectuation of the concept into a workable law requires further consideration. I offer it, however, in the hope that the administration of justice can be spared the further travails of trying to provision for an accountable prosecutor wholly independent of the Executive Branch of government. It is well to remember that it was a special prosecutor appointed by an Attorney General that successfully handled the investigation and prosecution of the Watergate affair, which gave birth to this entire controversy.

Mr. FRANK. I apologize. As you know, we had to vote, and Mr. Bryant and I just tried to execute a handoff here without interfering because of this.

Let me begin by asking, Mr. Terwilliger, on that one point, and I am saying we have a dilemma here and we have to choose. Let me ask first, is there anything in the statute that prevents, or maybe we ought to institutionalize this, the executive branch from making arguments in camera to the Independent Counsel against prosecutions because of national security?

That is, and maybe we could even work out some mechanism to make sure but I wouldn't have any problem with making sure, if there was any obstacle to the executive branch being able to make arguments, as I say, in camera to the Independent Counsel that this or that should not be pursued for the following national security reasons, has that ever been done, do you know?

Mr. TERWILLIGER. No. Well, informally perhaps, but the question, Mr. Frank——

Mr. FRANK. Answer the factual question before you get to an argument about it, OK?

Mr. TERWILLIGER. Sure.

Mr. FRANK. Is there any obstacle in the statute to that being done now?

Mr. TERWILLIGER. I would say yes, there is.

Mr. FRANK. There is an obstacle?

Mr. TERWILLIGER. The obstacle is the basic structure of the statute, and that is that the Independent Counsel has no obligation to even raise such matters as an issue, and there is no way for the Department, therefore, to know.

Mr. FRANK. I think, in some cases, they have a pretty good idea. In Iran-Contra, I don't think it was a total surprise. At some point, they know. But I think I wouldn't be adverse to putting some language in, and I take your point and I think you are right, people might argue that given the very structure of it, it was somehow contravening the spirit to have those kind of conversations.

I don't see any reason why the executive branch should be discouraged from making its arguments about national security to the Independent Counsel, as I say, in camera in a way that would be relevant.

Beyond that, though, and this is where we get to our policy disagreement, under your scheme or under your proposal, the other side has schemes and we have well worked out plans. We will either both have schemes or neither of us will. Under your proposal, the problem is that it is then a unilateral executive branch.

For instance, if we went to where you said you would have the Attorney General appoint someone, would the Attorney General have the right to say, but, by the way, these areas are off limits because of national security, or how would the Attorney General appointment power deal with the national security situation in this case?

Mr. TERWILLIGER. I think that is a good point, and that is exactly one of the reasons why a discretionary appointment with the Attorney General, and not having that appointment authority very closely circumscribed is important, because the degree of independence and the matters to be considered——

Mr. FRANK. But how would it work?

Mr. TERWILLIGER. If it were I making a decision like that, I would give the Independent Counsel the wherewithal to make recommendations on prosecution including assessment of national security concerns, but the ultimate responsibility to make a decision in the end whether or not to follow a recommendation of such an Independent Counsel should be either the Attorney General's or a designee.

Mr. FRANK. And I misunderstood this then. So under this thing, which I guess is like the way Malcolm Wilkie was appointed, was he under that authority?

Mr. TERWILLIGER. I don't know about Judge Wilkie, Judge Lacey was, however.

Mr. FRANK. So the Independent Counsel there, it is not an Independent Counsel in that he or she makes any judgments about what to do ultimately, he simply recommends and the Attorney General is——

Mr. TERWILLIGER. I don't mean to suggest that, Mr. Frank.

Mr. FRANK. Then I don't understand you.

Mr. TERWILLIGER. I am saying that the ultimate responsibility in the end is the Attorney General's and, just like in any prosecution today, the Attorney General can reach out through the U.S. attorney and say, "No, don't prosecute."

Mr. FRANK. I understand that. In the situation you are talking about, ultimately, finally, if the Attorney General doesn't want the prosecution to go ahead, it doesn't go ahead?

Mr. TERWILLIGER. That's correct.

Mr. FRANK. That is the biggest difference between the two situations?

Mr. TERWILLIGER. I think that is right.

Mr. FRANK. Then, my problem is in the area we get here, and I understand people who say, "Well, differences over foreign policy shouldn't be criminalized," the problem is, if you follow your scheme, and I think this is the case, if you read the circuit court in D.C.'s line of opinions, if you don't have an Independent Counsel, there is virtually no way the executive branch can be restrained from doing whatever the hell it likes in foreign policy, other than its own conscience, because there is no way anybody is going to get it to court.

You can pass all the statutes in the world, but you are then saying, however, the executive branch must be given the discretion to enforce those statutes or not based on national security grounds. If the executive branch thinks that for national security reasons no prosecution should obtain, there is virtually no way Congress can get in there. No private citizen can bring a suit. So how then do you enforce statutes that restrict the executives discretion in the national security area that the executive chooses not to enforce on itself?

Mr. TERWILLIGER. With all due respect, Mr. Frank, I think that is an oversimplification of my view, but let me answer your question directly.

Mr. FRANK. But it is the reality. I don't mean to ascribe it to you, but I am saying, and if I ascribed that to you, I didn't mean to, I do think that it is a consequence of the following. It is nobody's

particular preference, maybe, but if you look at the decisions in the circuit court, things like War Powers Act is a nullity. No one thinks the War Powers Act means anything.

Virtually none of those enactments have been successful. They are unenforceable by the doctrines worked out by the circuit court. If you then have a situation where even if a statute is enacted, the executive branch can, whenever it feels national security requires it, simply refuse to enforce it, what is the check?

Mr. TERWILLIGER. I think what you have, Mr. Frank, is essentially a legal dispute of constitutional dimension about what is the extent of the executive power when it comes to foreign policy and national security.

But leaving that issue aside——

Mr. FRANK. That is the central issue, because I suspect what you just told me is, the answer is there is no check because under your constitutional view the executive should do whatever it wants.

Mr. TERWILLIGER. No, that's not true, and I certainly would not describe executive power as the power of the executive in any area to simply do what it wants to do.

Mr. FRANK. Where is the legal formal check on the executive power?

Mr. TERWILLIGER. There are a number. First of all, if there is a statute which proscribes certain activity, and some aspect of the executive branch engages in it, then it is the Attorney General's responsibility to inquire into that.

If the Attorney General has a real conflict for some reason in doing that, or believes it politically advisable for reasons of public confidence, politics in the small "p" sense, then he can appoint or she can appoint an Independent Counsel to look into that without surrendering the ultimate responsibility to see to it.

Mr. FRANK. So that the Attorney General and the President will still decide, which means, and you have just restated your point, that if the President and the Attorney General, and in this case the Secretary of State, the Secretary of Defense, and the National Security Adviser, believe that it is in the interest of national security to ignore a statute, if they decide that in good faith, as Attorneys General and such officials have, then there would be no way to enforce it on them.

Mr. TERWILLIGER. I think we need to be careful with the language there. The decision is not to, as you put it, ignore a statute. The decision that is before the Justice Department in that kind of instance is whether or not a prosecution should be initiated for an alleged violation of law.

Mr. FRANK. Against people who violate a statute. Fine. I will accept that.

Mr. TERWILLIGER. The President has other disciplinary alternatives in front of him, if he believes a statute was ignored in the course and conduct of executive activity, he can fire people.

Mr. FRANK. You are missing my point, which is, what if the President decides, "That is a dumb statute, I don't like that statute, I wish they hadn't passed that statute, and if they knew what I know now when they passed that statute then, they wouldn't have passed that statute so, therefore, we are not going to pay any

attention to that statute, and anybody who violates it is home free."

There is nothing under your system that prevents that from happening is there?

Mr. TERWILLIGER. Well, that prevents it from happening? No, nor does an Independent Counsel prevent it from happening. The answer to your question, since we are talking in broad terms, is impeachment. The Congress can inquire into that kind of behavior and make a decision as to whether or not that constitutes grounds for impeachment, which is another way of saying that the ultimate accountability for the performance of executive functions, taking care of executing the law, is a political one, and that is a reality that I think we try to ignore by the statute.

The measure that I propose, I believe, and what these other witnesses have testified, to introduce a degree of independence that is appropriate to the circumstances that allows the public to have some confidence in that prosecutorial aspect of this.

Mr. FRANK. No, it doesn't because what you are saying is, one, I don't think that works as well when it is an appointee of the Attorney General, but also it misses the entire point I am raising which is, you are reserving to the right of the Attorney General and the President the right to say, "No, that is national security, it is none of your business, you can't deal with that."

Impeachment, now what you are suggesting, it seems to me, is that there should be one penalty and one penalty only for any statutory violation by the executive branch, and that is capital punishment.

Mr. TERWILLIGER. You were asking me about actions by the President.

Mr. FRANK. And appointees under the President, that is exactly right. I do not regard Iran-Contra, maybe this is a difference, but I do not regard Iran-Contra as a rather whimsical idea of eight people. I think that is what happens, and this often happens in national security cases, national policy is involved.

I still would like to ask, and let me ask Mr. Eastland, too, and Judge MacKinnon, and this will be my last question, if we don't have an Independent Counsel, what is the mechanism by which statutes that the President does not wish enforced can be enforced, if there are any?

Mr. TERWILLIGER. My answer is, the Attorney General doing his or her job and utilizing this alternative appointment.

Mr. FRANK. But if the President says to the Attorney General, don't do that, then the Attorney General complies presumably, right?

Mr. TERWILLIGER. That's correct.

Mr. FRANK. Mr. Eastland.

Mr. EASTLAND. I don't think the Congress can tell the President to prosecute a particular case, and I don't think the Supreme Court can tell the President to prosecute a particular case. It is, I think, as well that in the case that you outlined that you could always have someone resign in protest.

We just had a case where a U.S. attorney did resign, as you know, in protest down in Memphis, TN, so the justice system is such that people—there are many layers to it, there are a lot of ac-

tors in it, and it is very difficult for someone who has an opposing view not to make it well known.

Mr. FRANK. In the first place, because that is one of these self-defining things.

Judge MACKINNON. Let me say this, Counsel, Congress told the President to prosecute——

Mr. FRANK. When you speak in that tone, Judge, and say "counsel," you can say anything you want.

Judge MACKINNON. Congress told a President to prosecute the *Teapot Dome* case, directed the appointment of counsel, and provided for their confirmation by the Senate.

Mr. FRANK. Do any of you wish to contest an eyewitness on the matter of Teapot Dome?

[Laughter.]

Mr. EASTLAND. Sir, while I may not be able to go back that far, there is an interesting historical question here as to whether Coolidge on the basis of executive power, in fact, used his discretionary appointment power to name these outside counsels before the Congress, in fact, passed that legislation, the description of the legislation is correct.

Mr. FRANK. I think that is right. I also think it is probably the case, if Harding were still alive, we would have had a difference. It is not clear that Mr. Coolidge felt any great need to exonerate the memory of his predecessor.

But leaving the history aside, Mr. Eastland, you said Congress cannot tell the President to prosecute, the Supreme Court can't, that is true, but that is why we have Independent Counsel statutes. Even under the Independent Counsel, I disagree with the position, and I guess I didn't hear it, the position that Mr. Dash faithfully transmitted to us from the ABA, namely that there should be an appeal of a decision not to seek a prosecution, I don't favor that. I do think that is where we are. I do think the Independent Counsel statute highlights that and substantially lessens that possibility.

Mr. EASTLAND. Mr. Frank, I would just say that there is going to be no perfect system. The problem is that we try to minimize the problems that we do have. We do have the people's right to vote. They can eject a President, throw a President out. That has been limited somewhat, I think, by the 22d amendment, but I would also suggest the impeachment process is an important constitutional process, and ought to be utilized.

Mr. FRANK. I would disagree that it is better from the systemic standpoint to say that the only remedy in that case, as I said, would be political capital punishment. I think that calls for a degree of disarrangement of the system, and you talk about politicizing these disputes, it seems to me nothing politicizes it more than impeachment because in impeachment you are talking about kicking people out.

I would answer you the other way around, if, in fact, a President feels that a criminal violation of a law, whether it is perjury or the violation of the substantive act was justified by national security, then that is why we have the pardon power, and the advantage of the pardon power over the others is the pardon power guarantees there will be some public debate.

The problem in the other case is, and I started to say before, people say, "These always come out." They don't always come out. The ones that come out are the ones that come out, but the ones that we don't know about, we don't know about. It is to the credit of Judge MacKinnon and his colleagues and the rest of us in this system that there are still some people, where there have been Independent Counsel appointed, and I think we don't know who they were yet. There are still some appropriately private Independent Counsel appointments, and it hasn't come out. So I disagree that there is some automatic process by which all of these are going to come out as a public debate.

Mr. EASTLAND. Let me just say this, having worked in the executive, and I guess I am one of the few who has criticized the executive in this respect, I wish there had been a stronger assertion of executive power so that some of these things could have been debated.

Mr. FRANK. I agree.

Mr. EASTLAND. For example, if Ronald Reagan wanted to oppose the statute, he had two chances to oppose it by virtue of the veto power.

Mr. FRANK. I agree, and the problem I have is this, and you answered that in some of these cases the accusation has been perjury. If people don't oppose the statute forthrightly, and then subsequently lie to somebody about whether or not they followed it, then debate has been precluded, and in those cases criminal prosecution is not a happy alternative, but I don't see any other.

Mr. EASTLAND. Again, I don't know if you were here when I made the point, but I do think that Congress ought to look at those several laws that govern lying, misrepresentation, withholding, et cetera, from Congress, because it seems to me these need to be very clearly framed. As you know, they have not been used historically, some of those laws have not been used in the past. They have been used with a vengeance, I think, by Judge Walsh.

Mr. FRANK. I have no further questions, and I would guess nobody else has any, but I would guess that my colleagues who had to go off to vote might want to submit some.

With that, the hearing is adjourned, and I thank all the members of the panel. I think both panels gave us some very substantive testimony and I appreciate it.

The subcommittee is adjourned.

[Whereupon, at 12:30 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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March 3, 1993

STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF H.R. 811, THE INDEPENDENT COUNSEL REAUTHORIZATION ACT OF 1993

SUBMITTED TO THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS OF THE HOUSE COMMITTEE ON THE JUDICIARY

BY KATE MARTIN, DIRECTOR, ACLU/CENTER FOR NATIONAL SECURITY STUDIES AND GARY M. STERN, LEGISLATIVE COUNSEL

The American Civil Liberties Union appreciates this opportunity to present this statement in support of H.R. 811, the Independent Counsel Reauthorization Act of 1993. The ACLU is a non-partisan organization of nearly 300,000 members dedicated to the defense and enhancement of civil rights and civil liberties guaranteed by the Bill of Rights. The ACLU strongly supports the reauthorization of the Independent Counsel statute as an essential tool to protect against abuses of power by government officials, especially in the area of intelligence activities or other government actions carried out in the name of national security.

We believe that the statute should now be permanently reauthorized, and we urge the Subcommittee to amend the bill to

ensure that the Independent Counsel law does not again lapse in the absence of affirmative congressional action.[1]

The ACLU approaches the issue of the Independent Counsel statute with a set of separate and potentially conflicting concerns. On the one hand, the ACLU has long been involved in defending and protecting the constitutional rights of individuals including government officials who are suspected or accused of crimes. At the same time, the ACLU believes that maintenance of the rule of law and our democratic system of government requires that government officials who abuse their positions of trust be held accountable for breaking the law. We believe this is especially crucial when such violations involve secret government operations, most often conducted in the name of national security.

These separate concerns were illustrated by the ACLU's position in the Iran-Contra affair. When the affair first came to light in November, 1986, the ACLU called for the appointment of an independent counsel to investigate the possibility of crimes relating to the Iran-Contra affair. At the time, we pointed out that the Attorney General was not in a position to insure an impartial investigation because the White House had stated that the Attorney General had certified the legality of

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[1] The ACLU takes no position on the amendments in the proposed bill dealing with "added controls" or extending coverage to investigations of Members of Congress. However, we point out that no inherent conflict of interest arises when the Justice Department investigates Members of Congress in the way that a conflict arises when the Justice Department investigates high executive branch officials.

the Iran operation. We further urged that only an independent prosecutor could credibly conduct an investigation to determine the degree to which high level officials were involved in or had knowledge of the illegal activities. Later, after the appointment of such a prosecutor, the ACLU supported Iran-Contra defendants whose constitutional rights were violated during their prosecution. The ACLU submitted amicus curiae briefs on behalf of Oliver North and John Poindexter urging that their convictions be overturned because their Fifth Amendment rights against self-incrimination were violated when their immunized congressional testimony was used against them at trial. Their convictions were appropriately overturned in part on these grounds.

Considering both sets of concerns, the ACLU supports reenactment of the independent counsel statute. The record of the use of independent counsels in the past 15 years confirms the importance of the procedure to hold government officials accountable especially in the area of intelligence activities. We also do not believe that prosecutions by independent counsels pose any greater threat to the rights of criminal defendants than do prosecutions by the Department of Justice. Although some persons have criticized the statute on these grounds, in the main such criticisms have attacked practices by the independent counsel that are standard prosecutorial tactics e.g., plea bargaining. Similarly, the complaint that it is expensive to defend oneself against criminal charges is not unique to independent counsel prosecutions. Moreover, the appointment of

an independent counsel can serve to protect the reputation of innocent officials. Of the twelve independent counsel investigations in the last fifteen years, seven investigations resulted in no indictment. The subjects of those investigations had the benefit of being absolved of wrong-doing by a prosecutor publicly perceived as being impartial, instead of by a Justice Department investigation that could well have been viewed as a whitewash.

Even Administrations that have opposed the statute have recognized the importance of assuring the public that by appointing an independent counsel, controversial matters will not be covered up. For example, Iran-Contra independent counsel Lawrence Walsh was voluntarily appointed by President Reagan's Attorney General "to insure public confidence that all facts in this case be ascertained and acted upon appropriately." (At the time of the appointment in the fall of 1986, no officials triggering mandatory application of the statute were implicated in the investigation.)

The Independent Counsel statute was enacted in 1978 to remedy the obvious and dangerous conflict of interest posed when an Administration must investigate its own top officials for criminal wrongdoing. The law was enacted in response to the Watergate scandal, in which President Nixon was able to fire the Watergate special prosecutor because the President opposed the results of his investigation. The resulting statute set up a formal procedure that mandates the appointment of an independent

counsel to investigate a limited number of high executive branch officials and allows for discretionary appointment by the Attorney General to investigate any other government official, including members of Congress.

The ACLU believes that the independent counsel statute is particularly necessary to investigate allegations of criminal conduct by members of the intelligence community including the highest political officials because of the inherent conflict involved in the Department of Justice conducting such investigations. The Attorney General is a part of the intelligence community and as such has responsibilities both to carry out intelligence activities and to protect the secrecy of intelligence information when appropriate. Thus, when an investigation of criminal conduct by members of the intelligence community carrying out intelligence activities is required, she has a conflict in acting both as chief law enforcement officer and as a member of that community. The classification system presently covering most information concerning such activities also poses a special problem in undertaking such investigations. Because it is likely that much of the relevant information is classified, the Attorney General's responsibilities for protecting such information put her in a position of conflict in investigating alleged crimes relating to intelligence activities.

At the same time, it is extremely important to investigate alleged crimes by members of the intelligence community or the highest political officials, such as lying to Congress or to

government investigators, engaging in secret, "national security" activities that violate the criminal law, or engaging in politically motivated crimes such as those that occurred during the Watergate scandal. Such crimes are perhaps most dangerous to democratic government because they involve abuses of government power and have the effect of depriving the Congress and the public of their constitutionally prescribed role in making decisions including decisions about foreign policy matters. Such activities often implicate the Attorney General and the Department of Justice or other high political officials and make it virtually impossible for the Justice Department to conduct a thorough and impartial investigation. For example, in the Iran-Contra affair, one of the subjects of inquiry was whether the arms sales to Iran were illegal when the Attorney General had already certified the legality of the Iran operation.

The appointment of an independent counsel in December 1992, just days before the statute expired, to investigate matters relating to the Bush Administration's search of presidential candidate Bill Clinton's passport files confirms the continuing need for the statute. It also speaks to the need for permanent reauthorization. Nothing in the history of the act suggests that reliance on the statute has been excessive or that individual independent counsel have abused their authority.[2] While minor

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[2] Even if there had been an instance in which an independent counsel did abuse his or her authority, such an instance would not undermine the merits of the statute as a whole.

adjustments to the statute may be required in the future, the merits of the basic law itself should not be subject to continued political debate every five years.

Accordingly, we urge the Subcommittee, and the Congress as a whole, to reenact the Independent Counsel statute permanently, so that the country need never again face the prospect of the law's expiration which could result in a failure to investigate future allegations of abuses of power by high officials in the Executive Branch.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

GEORGE E. MacKINNON
UNITED STATES CIRCUIT JUDGE

March 4, 1993

Mr. Terry Eastland
Ethics and Public Policy
Center
1015 15th St., N.W.
Washington, D.C. 20005

Re: Congressional Power Over Executive Branch

Dear Mr. Eastland,

Enclosed is the 1924 Act in the Tea Pot Dome case that I referred to at the House Hearing yesterday which directed the executive branch (President) to appoint special counsel subject to Senate confirmation to prosecute the criminal cases in Tea Pot Dome and which over rode any "statute touching the powers of the Attorney General of the Department of Justice." (43 Stat. 5) 68th Cong. Sess. I., Ch. 16, approved February 5, 1924.

Respectfully,

George E. MacKinnon

Enclosure

CHAP. 16.—Joint Resolution Directing the President to institute and prosecute suits to cancel certain leases of oil lands and incidental contracts, and for other purposes.

February 8, 1924.
[S. J. Res. 54.]
[Pub. Res., No. 4.]

Naval oil reserves, leases, etc.
Preamble.

Whereas it appears from evidence taken by the Committee on Public Lands and Surveys of the United States Senate that certain lease of Naval Reserve Numbered 3, in the State of Wyoming, bearing date April 7, 1922, made in form by the Government of the United States, through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Mammoth Oil Company, as lessee, and that certain contract between the Government of the United States and the Pan American Petroleum and Transport Company, dated April 25, 1922, signed by Edward C. Finney, Acting Secretary of the Interior, and Edwin Denby, Secretary of the Navy, relating among other things to the construction of oil tanks at Pearl Harbor, Territory of Hawaii, and that certain lease of Naval Reserve Numbered 1, in the State of California, bearing date December 11, 1922, made in form by the Government of the United States through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Pan American Petroleum Company, as lessee, were executed under circumstances indicating fraud and corruption; and

Whereas the said leases and contract were entered into without authority on the part of the officers purporting to act in the execution of the same for the United States and in violation of the laws of Congress; and

Whereas such leases and contract were made in defiance of the settled policy of the Government, adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security: Therefore be it

Leases, etc., declared against public interest.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the said leases and contract are against the public interest and that the lands embraced therein should be recovered and held for the purpose to which they were dedicated; and

President to institute suit to cancel leases, etc.

Post, pp. 16, 1315.

Resolved further, That the President of the United States be, and he hereby is, authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of the said leases and contract and all contracts incidental or supplemental thereto, to enjoin the further extraction of oil from the said reserves under said leases or from the territory covered by the same, to secure any further appropriate incidental relief, and to prosecute such other actions or proceedings, civil and criminal, as may be warranted by the facts in relation to the making of the said leases and contract.

Special counsel to prosecute to be appointed.

Post, p. 16.

And the President is further authorized and directed to appoint, by and with the advice and consent of the Senate, special counsel who shall have charge and control of the prosecution of such litigation, anything in the statutes touching the powers of the Attorney General of the Department of Justice to the contrary notwithstanding.

Approved, February 8, 1924.

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